85-612

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

PROGRAM ENGINEERING, INC., a corporation,
Petitioner,

vs.

CALIFORNIA JOCKEY CLUB, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the fact of injury proven under Section 4 of the Clayton Act upon the proof of the direct impact of violative acts on business activities which acts have the natural tendency to injure any business and which were committed with an intent to inflict injury?

a. Does Section 4 of the Clayton Act require the entry of judgment on behalf of plaintiffs who prove violation of the antitrust laws and the fact of injury?

2. Does a finding by an appellate court that the defendant has committed overt acts which have injured the plaintiff upon a statute of limitations motion preclude the finding that the defendant has not injured the plaintiff under the Law of the Case?

3. Does the doctrine of Zenith Radio Corp. v. Hazeltine Research (1971) require a victim of a plan to drive it out of business to file a complaint at each

stage of the developing plan which injures it in order to prove causation or may its filing within the limitations period make relevant all acts committed by the defendant for the accomplishment of its goal of destruction?

4. Can summary judgment on the issue of the extent of damages ever be granted when the theories urged are reasonable and consistent with the injuries the defendant inflicted on the plaintiff?

a. Is the plaintiff entitled to obtain damages for the diminished value of all its assets on the forced closing of its operations?

b. Is the plaintiff, in addition, entitled to an award based on the loss of revenue it would have made between the applicable statute of limitation period and the forced closing of the business?

c. Is the plaintiff, in addition, entitled to recover the loss of projected net income for a reasonable period

of time in the future on the assumption that the defendant would allow the sale of the victim's publication on its premises?

d. Or, in the alternative to 4c, supra, is the plaintiff entitled to recover the loss of projected net income based on the nationwide business plans of the injured party for a reasonable period of time in the future?

LIST OF THE PARTIES

The petitioner is the plaintiff below. It is a California corporation.

The only other party below is California Jockey Club, a California corporation.

The other defendants named in the complaint have been involuntarily dismissed based upon prior orders of the courts.

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I.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit has not been certified for publication. A true copy of the opinion issued June 18, 1985 is attached hereto as Appendix A. A true copy of the order of the United States Court of Appeals for the Ninth Circuit denying petitioner's petition for a rehearing is attached hereto as Appendix B. A true copy of the United States Court of Appeals for the Ninth Circuit's opinion issued December 1, 1980 is attached hereto as Appendix C. It is reported at 634 F.2d 1188. A true copy of the trial court's order dismissing certain damage claims is attached hereto as Appendix D. A true copy of the trial court's order dismissing the remaining damage claims is attached hereto as Appendix E. A true copy of the trial court's order denying petitioner's motion for reconsideration and nominal damages is attached hereto as Appendix F.

A true copy of the trial court's order denying respondent's motion for summary judgment on plaintiff's claims for attempted monopolization is attached hereto as Appendix G. A true copy of the trial court's order dismissing plaintiff's claims for relief under Sec. 1 of the Sherman Act is attached hereto as Appendix H.

II.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 18, 1985. Appellant's petition for rehearing was denied on July 24, 1985 (Appendix B).

The jurisdiction of the Court is invoked under 28 U.S.C. §1254.

III.

STATUTES INVOLVED.

The statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §1, 2 and Section 4 of the Clayton Act, 15 U.S.C. §15. These statutory provisions are attached hereto as Appendix I.

IV.

CONCISE STATEMENT OF THE CASE.

A. Parties and Persons.

Program Engineering: Program Engineering (hereinafter from time to time, P.E.), the corporation, is a successor to Ralph Akins and Program Engineering, a limited partnership. During the period Sept. 1969 to about June, 1970, Mr. Akins employed 16 persons and developed a form to compile past racing statistics. He spent approximately $40,000 on the project and compiled 10,000 information sheets (ER. 208, 274). About April, 1972 Mr. Akins made prototype publications which combined a program with past racing information meets and workouts, for the use of non professional gamblers who attended horse racing for enjoyment. It was entitled, "Super Program" (ER. 213-214). Mr. Akins formed a limited partnership in Nov. 1972 (ER. 589). Its initial capital was $98,750. By March, 1973, equity had grown to $122,173 (ER. 616) and its loans

payable was $178,289 (Id.). It incorporated in July, 1973 at which time it issued shares for capital contributions and loans (ER. 607-614). Its initial capital stock was $352,909 (ER. 613).

California Jockey Club (hereinafter from time to time, "CJC"): The owner of Bay Meadows Racetrack, San Mateo County, California (ER. 11, 40). It operates the racing meeting during the period October to December. In 1973 the period was October 4, 1973 to December 22 (ER. 11).

For identification of other persons, see Appendix J herein.

B. Publishing Past Racing Information.

1. Racing Programs and Blow-off Editions.

The action involves control over the information available to persons who wish to wager on horses. The racing associations possess the basic information needed, the per race entries, type of race, the horse numbers, size, jockey, trainer, odds, track record, past track results,

horse parentage, jockey, and trainer records. CJC puts some of this information in its programs (ER. 283-292). In addition, the racing associations must provide the public with the entries 48 hours in advance of the racing day, and will provide the public with workout schedules as well as other pertinent information such as track records, parentage of horse,owners, etc. (ER. 209-211, 236). CJC makes available to the publishers and the daily newspapers, typewriters, telephones, viewing access, and direct wire service whereby information and results are teletyped into the publishers office (ER. 256).

Quarter Horse Racing and Harness Racing Associations produce programs which give the purchaser the results of some past races (ER. 293-299). Except for Super Program, such has not been the case with respect to thoroughbred horse racing, (See ER. 433-439). The only recourse for a patron of thoroughbred race meetings to

obtain past race results is to purchase the Daily Racing Form (Id., 443-444). The Daily Racing Form is published by Daily Racing Form, Inc., a subsidiary of Triangle Publications. The Daily Racing Form's audience consists of sophisticated professional wagerers whereas the Super Program audience was produced for the non-professional (ER. 301-306). The Super Program was in many ways, however, more finely tuned. It had a better classification and grading system for races, it had a self-conceived track variant, it published the opening as well as the closing odds, its commentary was more factual (See Article in June, 1973 edition of "Turf & Sport Digest" (ER. 301-306)).

Thus Mr. Akins had at least three objectives: a publication which would be able to reach the vast number of non-professional betters, to provide a necessary blow-off edition and to provide additional information not available in the Daily Racing Form. The Daily Racing Form

did not publish in 1972 a day before or "blow-off edition" for Northern California race tracks to allow preparation for the day's meet by studying past performance charts the day before.

2. The Publications.

The Daily Racing Form and the Northern California Daily newspapers publish daily entries and selections (ER. 349-355). These publishers all carry selections for the wagerer and provide comments designed to assist in picking the bet (ER. 308-355).

3. On Track Sales.

CJC restricts the position of sellers. Those which it classifies as tout sheets (those who predict winners without supplying past statistics) are placed outside the gates and grandstand called the enclosure. The Daily Racing Form, the newspapers specified above and the programs are sold inside the grandstand. One must pay admission before one can purchase these publications at the track (ER. 414).

4. Off Track Sales and Blow-off Editions

Daily Racing Form is also available at newstands, magazine stores, liquor stores. These outlets have been unable to carry editions of The Daily Racing Form for the next days races until late evening (ER. 219-221, 165, ¶8).

5. California Horse Racing Association and Meeting Dates (ER. 48-49).

The California Horse Racing Board allocates racing dates among the various private racing associations and county fairs in the State. The 1973 schedule is attached hereto as Appendix K:

C. Evidence of the Admitted Plan To Destroy Program Engineering By California Jockey Club.

The motion of CJC for the entry of judgment on the basis of the bar of the statute of limitations, the inability to prove causation and the failure of the plaintiff to have submitted theories of damages which were not speculative (ER. 532-561) were made on the admission, arguendo, that CJC had violated the anti-

trust laws (ER. 545:8-13; 844: 21-24; 845:8-9).

The following is the evidence of the plan to cause the destruction of Program Engineering's Super Program (See ER. 188--196, 274-279):

a. September, 1969 - June 1970: See p. 3, supra.

b. Feb. 1972 - Feb. 16, 1973: The Daily Racing Form refused the request of the P.R.A. to print a blow off edition for racing meets in Northern California although it did so for the Southern California tracks (ER. 211). Mr. Akins had begun to distribute Today's Racing Digest, at Golden Gate Fields, Albany, CA. Today's Racing Digest, was printed for 55 days in answer to the request. At the end of P.R.A.'s meeting, the owner of the Digest decided it was not worthwhile to continue the publication. (Id.) Mr. Akins then was requested to put into effect his own ideas as to format, type of information, comments believed to be needed (ER. 212).

In April, 1972 he made a prototype of his program and delivered it to the General Manager of T.R.A., Mr. Voorhees and an officer of California Jockey Club (ER. 212-214). The prototype cost about $15,000 (ER. 274). California Jockey Club's officer, Mr. Elkin, sent a copy to Mr. Jimmy Kilroe, the Secretary of Racing at Santa Anita, Arcadia, CA and Hollywood Park (ER. 49, 23). Mr. Elkin then arranged a meeting with Mr. Kilroe (ER. 214). At the meeting, Mr. Kilroe said the prototype was "the best thing I ever saw" (ER. 215) and requested the publication for its season at Christmas time, 1973 (ER. 215). Mr. Akins declined because of the commitments to the P.R.A. and T.R.A. (ER. 215). The trip to Los Angeles occurred in Sept. 1972 (ER. 188). In the same month, Mr. Akins received management's assurances and encouragement for the publication in connection with P.R.A.'s opening for February, 1973 (ER. 274). By this time Mr. Murphy had succeed

Mr. Voorhees (ER. 215). Between October, and February, 1973, P.R.A. supplied Mr. Akins with a racing office, telephones, lights, etc. (ER. 217). A letter of intent was entered into for the publication of Mr. Akin's new program and P.R.A.'s regular program (ER. 217; 57-58). In September, 1972, Mr. Akins had shown the prototype to Mr. Ralph Gunderson and his reaction was "cool, at best." (ER. 274).

In November, 1972, the Daily Racing Form announced that it would commence to print and ship an overnight edition for patrons of the Northern California tracks who could purchase it at the tracks on a day before basis (ER. 275). This broke 80 years of precedent (Id.).

c. February 16, 1973 to June, 1973 - Publication and Sale of Super Program and regular programs at Golden Gate Fields:

The Director of Publicity of P.R.A. and T.R.A. was Robert S. Wuerth (ER. 217). He was the Director of Publicity for CJC

(Id.). Mr. Bernard Berman was the distributor of the daily programs for all of these associations as well (Id.). Mr. Berman was informed by the management of Golden Gate Fields his services were no longer necessary. The threat of strike resulted and he was reinstated (ER. 367-368, 275, 242). The timing interfered with the distribution of the first day of publication of the Super Program (ER. 276). From the moment the meeting opened on Feb. 16, 1973 every effort was made by Mr. Wuerth and Mr. Berman to discourage the sale of the program at Golden Gate Fields (ER. 276). Mr. Berman told the sellers of the two programs, "Put the dollar programs down in the bottom of your stand and sell the 40 cent program. Do not offer the people the dollar program. If they ask for it, reach down and get one." (ER. 242) Mr. Wuerth failed to cooperate in any way to assist the sales of new Super Program. It was a reason for

his discharge at the end of the track meeting (ER. 245).

In May, 1973, the Turf and Sports Digest published a highly complimentary article lauding the Super Program (ER. 301-306). Mr. Wuerth then telephoned Mr. Akins. Mr. Akins was in his office and Mr. Wuerth was in the press box at Golden Gate Fields. Mr. Akins testified, "Mr. Wuerth was highly incensed as a result of his recently having read that article, and wanted me to apologize to him and to all of the various sports writers in the Bay Area. My comments to him were, 'if you find one syllable in that article that is not the truth and the whole truth, I will apologize'". Mr. Akins then stated, "But he and every newspaper writer in the area beat every drum and every bush imaginable to damage Program Engineering in any way they could." (ER. 227-228).

In February, 1973, the Chairman of the California Horse Racing Board, Mr.

John V. Newman had written to Mr. Murphy, in part, (ER. 393):

> I also received samples of your Race Program, and think it excellent. I have asked Mr. Harman, Secretary of our Racing Board, to suggest to you a very slight change in the way in which Board of Stewards are to be listed.

d. Inability to distribute and sell programs at the California County Fair Circuit, June to July, 1973: The Directors of the Solano County Fair determined not to allow the sale or distribution of the Super Program at the Solano County Fair Race Track (ER. 59). Petitioner applied for and received a temporary restraining order (ER. 370-372). An officer of California Horse Racing Commission was dismayed at the denial of selling rights (ER. 276). Petitioner was able to sell its Programs for 5 days (ER. 60). Mr. Robert Wuerth was Director of Publicity for the Fair and Mr. Berman distributed and printed its programs (ER. 375-383). The Superior Court Judge found Super

Program was not a tout sheet, but that petitioner had been guilty of laches (ER. 386-389). During the period the Super Program was being sold, its sellers were harrassed by Mr. Berman (ER. 229).

Mr. Akins was next informed that the Alameda County Fair, the Santa Rosa County Fair would not grant permission for its sales and he decided to discontinue publication (ER. 230-231). He then devoted his time to developing an expended and improved version (ER. 230-231). Mr. Rodney Fraser, Operations Manager for CJC at Bay Meadows assisted the Operations Manager for the Alameda County Fair Race Track (ER. 142).

e. August, 1973: At a meeting between Mr. Akins and Mr. Kilroe in Los Angeles concerning the publication for Santa Anita and Hollywood Park, Mr. Kilroe stated that the Super Program, "is amazing. There is nothing like it. It's extremely well done, but that there is a problem, Walter Annenberg has told Mervin

Le Roy, [owner of the Hollywood Park] 'to get this thing they killed'". (ER. 231-232).

f. TRA at Bay Meadows, 9/3/73 - 10/6/73: Mr. Gunderson prevailed upon Mr. Murphy of T.R.A. not to use the Super Program at its meetings at Bay Meadows (ER. 234). The request resulted in Mr. Akins being unable to publish and sell the regular programs, but was allowed to sell the Super Program (ER. 234, 268-271, 397-406, 476-477). Mr. Akins was assigned the poorest locations at Bay Meadows. As Mr. Akins stated, "While Mr. Murphy agreed with me 100 percent, he still yielded to Mr. Gunderson's demand that they relocate the selling position of Program Engineering sellers." (ER. 271). Mr. Fraser, CJC, testified that (ER. 477):

> Q. Well, why was not that matter handled by Tanforan Racing Association rather than California Jockey Club?
>
> A. It has to be mutually agreed upon. Anything that takes place at Bay Meadows

> with an association; and they wish to do something, it has to be mutually agreed upon.

Mr. Voorhees testified that he considered it costly to use Mr. Berman as distributor and The San Mateo Times as publisher (ER. 456-464) for his programs. Mr. Voorhees was told by Mr. Gunderson that he had no option but to print at the San Mateo Times; that, indeed, if he did not, the Times might not print racing news during the meeting (Id.).

Mr. Wuerth and Mr. Gunderson engaged in a ploy to convince Mr. Murphy not to allow Super Program at the TRA meeting. A scurrilous letter was written August 10, 1973 (ER. 395). It was addressed to Mr. Bob Gunderson. The letter begins, "Ralph Akins' $1.00 program and the manner in which it was foisted on the public at Golden Gate Fields gave racing a black eye last spring." Mr. Gunderson sent the letter to Mr. Murphy (ER. 147). Mr. Akins testified that the letter was written on

the typewriter of Mr. Wuerth which he tested, and that no one else used that typewriter (ER. 269-270). Mr. Murphy handed the letter to Mr. Akins (Id.). The letter had the effect of relocating the selling position for sale of the Super Program (Id.).

g. California Jockey Club at its Bay Meadows track, October 8, 1973 - November 2, 1973:

Mr. Gunderson informed Mr. Akins that he would be unable to sell the Super Program during the CJC meeting beginning in October (ER. 234). This was about a week before opening (Id.). On the closing day of the TRA meeting at Bay Meadows, the President of P.R.A., Mr. Qvale, asked Mr. Akins if he had come to an arrangement with Mr. Gunderson. Mr. Akins informed him what had occurred. Mr. Qvale immediately turned and marched into Mr. Gunderson's office and he came out about 15 minutes later, stating, "You go in now. You'll be on the grounds." (ER. 235). Mr.

Akins then talked to Mr. Gunderson who stated to him he could sell. However, the name of the publication would have to be changed to Super Racing Guide, post positions numbers could not be used, and he was to be assigned less advantageous locations (ER. 148; 235). On the first or second day of the CJC meeting, Program Engineering's sellers disappeared (ER. 235-236). Shortly thereafter they were hired by CJC (ER. 236). The sellers then worked for CJC for the balance of the week. Mr. Fraser then told Mr. Akins a mistake had occurred and he asked Mr. Akins to take the girls back (Id.). The following day Mr. Akins received a call from Dennis Patterson, P.E.'s track correspondent, that he had been refused permission in the Racing Office (ER. 236). CJC also terminated petitioner's teletype service (ER. 256). Mr. Akins then filed an action in the San Mateo County Superior Court for an injunction (ER. 407-425). Mr. Gunderson attempted to justify the

exclusion from CJC's racing information on the grounds that Super Racing Program (Guide) was interfering with its daily program sales, that it should be treated as a tip sheet and restrict its sales outside the entrance gates (ER. 412-414). A settlement agreement was then entered into (ER. 652-653). The agreement was limited to the fall meet of 1973 and provided: (1) Petitioner was to remove all post position numbers from its publication; (2) The name of the publication was to change to SUPER RACING GUIDE, deleting the word "program" completely; (3) The column that read Program Engineering Morning Line was to be changed to Program Engineering Probable Odds; (4) Petitioner was to instruct its sellers they were not to write in post position numbers and request customers not to write them in; (5) CJC was to provide a full teletype service but P.E. agreed to pay for the service and would abide by rules governing tip sheets; (6) P.E. was to have three selling locations inside each main gate; (7) P.E.

was to be responsible for solving all of its labor problems. If at any time CJC was threatened with a strike, walk-out, or direct informational picketing by reason of the fact that P.E. was on the race track premises, CJC reserved the right to exclude P.E. pending solution; (8) P.E. was to have the same access to the Bay Meadows racing office as provided to the DAILY RACING FORM; (9) Execution of the agreement was not in any way to constitute agreement that P.E. is classified as a tipster (Id.).

The sellers of the Daily Racing Form are not members of any union (ER. 149). CJC does not seek any income for the sale of the Daily Racing Form on its facilities (ER. 447). It did obtain a $15.00 a day fee from P.E. (ER. 652).

On October 25, or 18, 1973, at 10:30 in the morning, representatives of three labor unions appeared at the premises of Bay Meadows, Local Nos. 921, 98 and 665 (ER. 238-239). Mr. Fraser had talked to

Mr. Goldberger the prior day (ER. 166). Mr. Fraser approached Mr. Akins and said, "Ralph, you are going to have to get off." Mr. Akins told Mr. Fraser, "I don't understand that [the labor pickets]. I just talked to the man from the union yesterday afternoon, and he was in perfect accord that there was no problem yesterday afternoon." (ER. 239).

The use of threatened picketing as a means of breaking the settlement agreement between CJC and P.E. was shown to be a sham. The Constitution of the International Brotherhood of Teamsters, et al., pp. 70-74, ER. 427-429, provides that picketing was to be authorized by the Joint Council and receive its permission. No such authorization was shown. The agreement which P.E. had with Local No. 96 required the resolution of disputes before a joint committee (ER. 97-98). The agreement provided there shall be no strike or lockouts during the life of the agreement, Jan. 28. 1973 to Feb. 1, 1975 (ER. 97,

101). The employees of distributors of the Daily Racing Form and its sellers are not unionized (ER. 149). The Assistant General Manager of California Jockey Club was impeached on what occurred at the picketing. In Mr. Fraser's Declaration In Support of Motion for Summary Judgment (on the violation issue), ER. 47-51, he declared that, "I heard the men arguing about Program Engineering's failure to pay union benefits and wages to its program sellers." In his deposition, Mr. Fraser testified that he was not close enough to the persons present to have heard what was said (ER. 158).

The picketing was supposed to have been explained by a letter dated October 24, 1973 from Mr. Bovey of Local 96 to Mr. Goldberger of Local 921 (ER. 80). But the picketing is alleged to have occurred on Oct. 25, 1973 (ER. 358-359). Mr. Bovey testified that he did not deliver it, and it was probably placed in the mail (ER. 483). As such there would not have been

sufficient time for the letter to have reached Mr. Goldberger before the picketing. Mr. Bovey had no recollection of talking on the telephone with Mr. Goldberger concerning the contents of the letter (ER. 481). The defense during discovery learned of a Union request for past due payments dated August 10, 1973 (ER. 105). It did not threaten picketing. The appearance of picketers did not occur until after CJC had promised P.E. it could sell its Program on the same basis as the Daily Racing Form and the daily newspaper's racing editions.

h. CJC Prevented P.E. from selling programs outside the Bay Meadows Racetrack after ordering it off the premises on October 25, 1973: Mr. Akins' chronology (ER. 278) and testimony discloses that after Mr. Fraser ordered him off Bay Meadows he received authorization from Mrs. Williams to sell on her parking lot located at the west side of tracks. At approximately 11:00 or 11:30 a.m.. Mr.

Fraser then went to see Mr. Williams. Thereafter his son, Fred, and grandson, David, asked Mr. Akins to leave because Mr. Fraser threatened to fence off the boundary of the property (ER. 239-240). Mr. Akins subsequently received permission from Mr. Rose, Manager of Foster's Restaurant, to utilize property near the Bay Meadows on the west side of the parking lot (ER. 195-196). After giving away Super Guides for donations, he received a phone call on October 31 from Mr. Rose that his permission had been rescinded. The property had been purchased by California Jockey Club as of Nov. 1, 1973 (ER. 85) and CJC stipulated that Program Engineering had to be removed at once (ER. 241). Mr. Gunderson personally came over and asked Mr. Akins what he was trying to do on October 31 (ER. 266-267). Thereafter, Mr. Akins obtained permission from Southern Pacific Transportation Company to use a parcel of land inside the fence at Bay Meadows. Mr. Akins began selling the

program at 11:00 a.m. on November 2, 1973. Mr. Fraser then confronted Mr. Akins with the statement that Ralph Akins, "should not be standing on that land selling programs." Mr. Akins reported to Mr. Fraser, "Rod, you're the one that shouldn't be standing on this land." He then saw Mae De Vol, the Secretary of CJC drive away. At the conclusion of the selling day, about 2:00 p.m. Mr. Akins went to Southern Pacific. He was informed that Southern Pacific had found it necessary to tear up the agreements they had drafted in favor of initiating an additional add-on lease with California Jockey Club for the property (ER. 196-201). The letter agreement between Southern Pacific Co. and CJC is dated November 2, 1973 (ER. 87-88). The last day of P.E.'s operation was November 2, 1973 (ER. 28, 193, 201).

D. Damages Suffered.

Petitioner, in answers to interrogatories, asserted it was entitled to awards of damages based on experiencing the

following injuries, in the alternative (ER. 570-586).

Claim 1, Damages due to the forced closing of the business (ER. 571): P.E. sought damages for the diminished value of its lost business. It claimed that the value of its assets could be approximated by its capital accumulations, an amount of $484,334 (ER. 571, 580). Total capital and expenditures amounted to $650,592 (ER. 581).

Claims 2 and 3, Loss of future profits from lost nationwide sales. Petitioner asserted that respondent knew that it was in the business of preparing programs with past performance and work out results for nationwide use. CJC, with specific intent to do so, destroyed that nationwide opportunity. Damages were asserted to be over $25,000,000 (ER. 573).

Claim 4, Loss of gross profits at Bay Meadows, 11/1 - 11/4/73 (ER. 573, 583): Petitioner claimed damages for the loss of revenues and profits for each day of

November 1, November 2, November 3 and November 4. Super Guide was actually printed and distributed for 11/1 and 11/2 as shown above. Nov. 3 and 4 was a weekend when the tracks obtain higher attendance days. A publisher would therefore have every incentive to publish for the weekend. Gross revenues were based on the sales of the CJC programs for these four days. Net profits based on program seller's costs of 7 cents were also calculated (ER. 583). Lost gross profit would be $23,901 (Id.).

Claim 5, Loss of future net profits at Bay Meadows during the period from Nov. 1 to Dec. 23, 1973, the last day of the CJC annual meet (ER. 574,584): Petitioner asserted that but for the plan to destroy its business, it would have published and sold Super Program to the end of the CJC meeting. It urged that the actual number of small programs sold by CJC were a yardstick. Assuming sales at $1.00 per copy it estimated lost volume at 100% of sales

at $285,559. It then determined its total costs from 4/73 to 10/31/73 ($435,054) and arrived at cost per racing day figure of $4,183. Had it sold the same number of programs as did CJC it would have made a profit of $122,422. Program seller costs were then deducted to arrive at a figure of $102,303 as lost net profits (ER. 584).

Claim 6, Loss of future profits per season at Bay Meadows for a 5 year and 10 year projected period: In addition to claiming damages to the end of the season, it calculated damages for a five and ten year future period, reduced to present value (ER. 585). At five years the figure was $750,750 and at ten years, $1,501,500.

Petitioner did not treat these damage calculations as inflexible. It asserted the need to only produce relevant data from which a jury may make a just award of damages suffered (ER. 792).

E. Relevant Data Offered By Petitioner

There exists direct evidence of

P.E.'s inability to sell its Super Racing Program at Bay Meadows on October 31, 1973, November 1, and November 2, 1973 solely because of the actions of CJC. Evidence consisting of a daily schedule prepared by Mr. Fraser corroborated the events as described by Mr. Akins for this period (ER. 358-359). This schedule records the day, the weather, how many programs were ordered, were sold, how many were complimentary, were destroyed, the program deposit, the percent sold to attendance, the percent destroyed to attendance, the accumulated total income from programs and average sales. The only days in October noting sales of Super Guide were Oct. 11 and 12. Outside the gate activities are specifically noted, however, in columns 12 and 13. In these two days 1,159 Super Guides were sold.

The week by week sales of P.E. are disclosed in a schedule prepared by it (ER. 605). They were described by defense counsel as, "Record of Plaintiff's Sales

(ER. 563). Indeed, defense counsel laid the foundation for the introduction of the exhibit into evidence at ER. 774.

1. Mrs. Leaster's schedule covers the period Feb. 25, 1973 to Nov. 2, 1973. In the last week of the first month at Golden Gate Fields, P.E. sold 5312 Super Programs at the track (ER. 605). It sold 5819 programs at Bay Meadows the last week of the TRA Meeting (Id.).

2. The reconstructed Balance Sheet and Income and Expense, Accrued, Statements as of October 31, 1973, were placed into the record by CJC (ER. 639-640). It showed capital stock at $332,039; net loss at $247,286 and total remaining capital at $84,753.

3. The reconstructed Balance Sheet, and Income and Expense Statements, Cash Basis, October 31, 1973, were placed into the record by P.E. (ER. 576). It showed Capital Stock at $352,909 and net losses at $128,348.

4. The schedule of investments in

P.E. by way of stock or loan, month by month, prepared by P.E.'s ex accountant was placed into evidence by CJC (ER. 606, 751-752).

5. P.E.'s stock purchase agreement dated July 14, 1973, containing a table of stock ownership in exchange for capital contributions and loans to Program Engineering (ER. 607-615) was placed into the record by the defense (ER. 563). It showed initial capital as $159,750 and loans to be exchanged for shares at $193,159, a total of $352,909.

6. Mr. Akins prepared a study of every major racing meet in the United States, and set forth the actual 1972 attendance of each track. He calculated the overhead, operating and printing costs of P.E. and arrived at per day costs and profits related to daily attendance at representative tracks based on attendance (ER. 802-821). He estimated the volume of sales based on the attendance at 40% of the total and arrived at estimated profit

or loss by track attendance figures (ER. 821, 572-573; 700-704). He estimated a potential profitability of $5,552,631 per year (Id.).

In addition, P.E. produced its check record, original books of entry, monthly cash receipts showing income by day, summary of obligation upon termination (ER. 618-627, 741, 747, 768, 633-634, 636-638).

F. Decisions Below.

In 1978 CJC moved to dismiss the complaint on the ground that no overt acts had been committed prior to the running of the statute of limitations (Appendix C-6). The motion was brought under Rule 56. CJC's motion was addressed to the general conspiracy count of petitioner's complaint and the Fourth Cause of Action which alleged that CJC had violated Sections 1 and 2 of the Sherman Act in preventing the sale of the Super Program at Bay Meadows (ER. 8-9, infra). CJC urged that no overt acts were committed by it because each action which occurred after October 31,

1973 was for a valid business purpose (Appendix C-23-24). The Ninth Circuit reversed the grant of summary judgment as to CJC. It ruled that petitioner had demonstrated material issues of fact as to whether the acts committed after October 30, 1973 were committed pursuant to an anticompetitive purpose or had an anti-competitive effect. If so, the respondent had violated Sections 1 and 2 of the Sherman Act (Appendix C). The appellate court did not rule on the issue of whether the statute of limitations had been tolled against CJC until P.E. went out of business (Appendix C-28, fn.4).

The Ninth Circuit held, however, that under the rule that a cause of action accrues each time a plaintiff is injured by an act of the defendant, limitations had not run (Appendix C-17).

On remand the trial court, over the opposition of petitioner, dismissed P.E.'s conspiracy claim against CJC (Appendix H; ER. 565, 966-968, 973-974). The Fourth

Cause of Action reads in pertinent part (ER. 8):

> 26. Defendant California Jockey Club is sued herein separately for its violation of the Sherman Act, §§ 1 and 2.
>
> 27. At all times herein California Jockey Club has discriminated against and finally has prevented plaintiff Program Engineering from selling its program at Bay Meadows. Although allowing Daily Racing Form and the San Francisco Examiner access to all information at the racing office and sale at all points of sale on the grounds of Bay Meadows, such rights were denied Program Engineering.
>
> 28. The inability of plaintiff to sell its programs at Bay Meadows was a substantial factor in the closing of the business and plaintiff alleges the same damages from California Jockey Club as above prayed for.

After the entry of the order on the mandate, CJC filed a motion for summary judgment on the substantive claims of monopolization, attempted monopolization and refusal to deal (ER. 37-134, 976-1004; TR. ER. 489-521). The court granted CJC's motion as to monopolization, but ruled the factual issues involved in attempt to

monopolize were genuinely in issue (Appendix G; ER. 510). The petitioner had filed extensive opposition papers on the merits and detailed the overt acts endured in its dealing with CJC (ER. 135-487).

Respondent filed another motion for summary judgment in August 1983 (ER. 529-774). The motion asserted the bar of the statute of limitations, the inability to prove causation and the failure of the plaintiff to have submitted theories of damages which were not speculative (ER. 532-561). The motions of CJC were premised on the admission that CJC had violated the antitrust laws (ER. 545:8-13; 844: 21-24; 845:8-9.)

The dismissal of plaintiff's complaint and the entry of judgment with prejudice then occurred in two stages. Firstly, the court dismissed all claims for lost property values, nationwide lost profits and claims for loss of profits at Bay Meadows for the period 11/1/73 to 12/23/73. As to the claim, for loss of

revenue from sales for the period November 1 to 4, 1973 and for projections based on the capitalization of profits from future sales at Bay Meadows, the court held that although the damage theories were appropriate, the issue of causation could be decisive, assuming that the IRS had prevented the continuation of the plaintiff's business (Appendix D). It then ordered the production of relevant IRS documents. The order was entered January 20, 1984. Petitioner thereafter filed a motion for reconsideration (ER. 915-921). In the alternative, it prayed for the entry of judgment in its favor and for the award of nominal damages and attorney fees (Id.).

The production of documents by the IRS resulted in the information that P.E. was making payments in October, 1973 but did not pay all of its tax liability (ER. 924). Mr. Akins located the Release of Levy forms of the IRS which was transmitted to counsel for CJC (ER. 924-925). These showed that the IRS levied on cer-

tain personal property on November 2, 1973, that personal property was released on November 7, 1973 and December 10, 1973. Mr. Akins has testified that P.E.'s plant was not padlocked (ER. 515). The parties filed briefs on the causation issue (ER. 922-929; 930-937). Respondent urged, ER. 927:2-7:

> To survive summary judgment on the issue of causation, plaintiff must prove that some act by CJC during the period of limitations -- i.e., after October 31, 1973 -- caused the delinquent tax liability of prevented plaintiff from curing that delinquency prior to issuance of the levy on November 2, 1973. That plaintiff cannot do."

Petitioner urged (ER. 932:1-4):

> There is no dispute that CJC committed overt acts prior to the time the Internal Revenue Service took any action which would interfere with its operations (634 F.2d at 1195-1196).

It further urged that refusal to deal would naturally cause the loss of sales (ER. 932: 13-14).

P.E. urged that precise damages can

be arrived at for the period Oct. 31, Nov. 1 and Nov. 2, 1973 (ER. 932:15-26):

> Taking Golden Gate Fields as an example (2/73-6/17/73), and using the actual attendance at Bay Meadows (Declaration of Maxwell Keith, 9/6/83, Ex. 16) one arrives at 3 days of attendance being 20,462 of which a minimum of 22% of Programs should have been sold (DX-G). At $1.00 a program there is shown a loss of sales of $4,400 in three days. Or, taking 11/2/83 as a single date; attendance was 6,722. At 22%, 1478 programs would have been sold, at a loss of income of $1,478.84. According to DX-G there were no sales on 11/1/73. As such, a similar loss of $1,400 would be recorded. Clearly these damages are recoverable under the proposition that an illegal act which prevents sales causes injury.

The trial court ignored any overt committed by CJC occurring on October 31, 1973, the stoppage of sales on Nov. 1, 1973 and centered its attention on Nov. 2, 1973 as the only relevant date by reason of the statute of limitations (ER. 950-951, Appendix E). The complaint was filed on October 31, 1977 (ER. 1). The trial court then proceded to eliminate from consideration any effect of any actions prior to

Nov. 2, 1973. It then dismissed the remaining claims for damages on the ground that the IRS had closed its operations on Nov. 2, 1983; thus cutting off any claim for future profits (Id.).

After the second opinion was announced, petitioner renewed its motion for entry of judgment (ER. 952). The court denied the motions without argument (ER. 964, Appendix F.). Memoranda had been filed (ER. 956-963).

The learned court below viewed the damage issue as involving only damages for the demise of the business and held as a matter of law that Program Engineering was under capitalized and doomed to fail by its own weight; that, further, the records of the petitioner, held to be in poor condition as a matter of law, were necessary for consideration of the causation issue and that their condition precluded the making of a genuine issue as to causation (Appendix A herein).

Petitioner filed a motion for

reconsideration which urged that the petitioner was not in financial chaos when he was publishing for Golden Gate Fields. It was pointed out that Mr. Akins did not testify that P.E. was in financial chaos during the period February to October, 1973 (ER. 694-698, Clerks' Record 52, p. 372-373); that the unions were not pressuring P.E. to pay arrearages (ER. 156-158) and that CJC was in a position to injure petitioner at Golden Gate Fields (ER. 156-158). It was also urged that the Law of the Case precluded dismissal based on the issue of injury (Id.).

ARGUMENT

I.

THE DECISION IS IN CONFLICT WITH ESTABLISHED RULES THAT CAUSATION IS A MATTER OF THE NATURAL TENDENCY OF ACTS TO CAUSE HARM AND THAT THE FACT OF INJURY IS ESTABLISHED BY IMPACT OF THE WRONGFUL ACTS UPON THE ATTEMPTED EFFORTS OF THE PLAINTIFF TO COMPETE REGARDLESS OF HIS ECONOMIC HEALTH.

A. Petitioner Has Established the Fact of Injury as a Matter of Law, as a Matter of Law of the Case and as a

Matter of Substantial Evidence.

1. CJC intended to and did directly harm P.E. in preventing the sale of the Super Programs during the period Oct. 31, 1973 to Nov. 2, 1973.

This is the second occasion in 1985 for the Ninth Circuit to affirm a decision of the Honorable Spencer Williams on the issue of causation. The prior opinion is Northwest Publications, Inc. v. Crumb, 587 F. Supp. 1123 (N.D. Ca. 1984), affirmed, 752 F.2d 473 (9th Cir. 1985). Under the standard proposed by these decisions the plaintiff shoulders the burden of proving a tangible loss to his business according to his financial records exclusively. Northwest Publications also requires the issue of causation to be decided from the standpoint of what would have occurred in the market place to the plaintiff assuming the violator abided by the antitrust laws. Victims of forbidden conduct must rebut the court's market analysis to prove

causation after demonstrating harmful impact. This allows the impact of the proven violation to be entirely ignored. This new antitrust interpretation grants the violator the double protection of first requiring proof of his violation of the Act and then protecting him from judgment on the causation issue by reconstructing his behavior to allow an identical lawful impact on the plaintiff. An Act protecting the right of market entry or freedom from price control has been transformed into an Act which reconstructs unlawful behavior to be entirely lawful upon the question of liability for money damages. The Northwest Publication opinion thus makes such erroneous statements as the before and after test authorized in Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) is a means of showing causation rather than determining the extent of damages. The court states as to the before and after test, 752 F.2d 477:

> Even if the inherent artificiality of this evidence diminishes its usefulness in proving the amount of damages, if any damages are proven using this method, causation is established.

In Program Engineering, the learned court of appeals thus went to the records of the petitioner, and stated their condition precluded the proof of causation. But Bigelow, supra, teaches that causation is for the trier of fact to determine as a matter of the natural tendency of wrongful acts to injure a business. The correct application of law to the private action is that injury is a matter of the violative acts having impact or interfering with the free market efforts of the plaintiff in carrying out his right to compete. The constant tendency of the courts is to find some way in which damages may be awarded where a wrong has been done. Such an award cannot occur if the analysis of causation overlooks the impact of each move by the defendant which counters each

attempt to remain business by the plaintiff to its final destruction.

The change is law and view is made clear by reason of the two opinions in the instant action, and the consequent failure of the learned court below to apply the Law of the Case.

The Court of Appeals in 1980 concluded its opinion with the statement, "These facts at least suggest that within the limitation period Program Engineering was injured by the action of CJC . . . (Appendix C-25).

"These facts" refer to the beginning of the paragraph which states (Id.):

> For no stated reason Akins was forced off the Foster Restaurant property the same day that CJC's purchase of that property was finalized. Program Engineering last printed the Racing Guide in November 1973 and shortly thereafter went out of business.

Overt acts which took place on Oct. 31, 1973 were definitely included the mandate of the Ninth Circuit.

But a judgment cannot stand when based on refusal to carry out a mandate of a prior opinion. Moore v. Jas. H. Matthews & Co., 682 F.2d 830 (9th Cir. 1982); Pachymayr Gun Works v. Olin Mathieson Chem. Corp., 502 F.2d 802 (9th Cir. 1974). Diminished revenues of a company in business, reduced by the estimated costs not yet incurred, is the measure of recovery for a certain injury. Bigelow v. RKO Radio Pictures, Inc., supra. Since P.E. had produced and distributed on the above dates the only such costs would be program seller costs. Clearly, the judgment below must be reversed and an order entered allowing a trial on the extent of damages suffered on these dates. Proof of stoppage of sales constitutes direct evidence of injurious impact.

2. CJC intended to cause the demise of P.E. and wrongful acts supporting this intention may be found to be the cause of its ceasing operations.

Firstly, it is noted that the trial court did not rule that the diminished value of the petitioner's business was not attributable to acts of CJC. It ruled that a losing and insolvent company had no way of proving the only available damages claims (Appendix D-10). The learned court below, however, ruled that the question was not one of damages but rather was one of causation. In so ruling the appellate court is in direct conflict with Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931). In reversing a similar ruling by the court of appeals, this Court stated, p. 566:

> But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body. Whether the unlawful acts of respondents or condition apart from them constituted the proximate cause of the depreciation in value was a question, upon the evidence in this record, for the jury, 'to be determined as a fact, in view

of the circumstance of fact attending it'.

The evidence showed support of the Super Program by all unbiased observers: the President of the California Horse Racing Board (ER. 393) the author of the article in Sports Turf and Digest, (ER. 300-306) The owners and operating managers of TRA and PRA; Jimmy Kilroe (ER. 231-232). P.E. continued to raise capital all through 1973 until October (ER. 606). It was the final inability to sell the Super Program at Bay Meadows that caused the decision to cease (ER. 193). P.E. had raised $32,000 in October 1973 (ER. 606, 630-631). Since CJC interfered with P.E. at all times it was in operation, a prior period of absolute free market comparison is not available. The issue becomes then one of a matter of just and reasonable inference. Bigelow v. R.K.O. Radio Pictures, supra. Here the record showed substantial past sales of the Super Program, the compilation of necessary racing result

statistics, the establishment of an organization equipped to operate in North America, the finding of a niche in the presentation of past racing results and workouts in conjunction with position numbers and daily programs (ER. 300-306). The Super Program, itself, thus supports a finding that P.E. would have survived had it received treatment equal to that received by the Daily Racing Form at Bay Meadows by CJC.

As stated by this Court in Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 697 (1962), referring to the opinion of the Ninth Circuit Court of Appeals, 289 F.2d 86 at 90:

> Where the plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that the jury, as the trier of the facts, must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists.

An actor's conduct is considered the legal cause of the harm he intends to

inflict. Associated General Contractors of Calif., Inc. v. California State Council of Carpenters, et al., ___ U.S. __, 103 S.Ct. 897, 914, dissenting opinion of J. Marshall (1983). There appears no argument over this proposition. See, majority opinion, 103 S.Ct. 908, fn.35. See Restatement of Torts, §279 (1934). But the stipulation here, arguendo, is that CJC entered into a plan to destroy P.E. Clearly, then, the issue of causation of P.E.'s demise is one for the jury.

3. Petitioner presented substantial evidence that CJC's plan to destroy it interfered with its objective to operate in the United States and Canada.

Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) was adopted by the trial court as setting forth the elements to be proven by a start up company which claims damages for total exclusion (ER. 913). It is clear that the trial court has disregarded the intention of Fed.R.Civ.P. 56 to determine only whether material issues of fact

exist. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962). Substantial evidence supported the showing that plaintiff was the originator of the Super Program with its variety of innovations (p. 9-10, supra). To find that the Super Program was unsuccessful as a matter of law constitutes an unauthorized weighing of the evidence. It was only unsuccessful because of a plan to destroy it, as admitted. To find that plaintiff never negotiated or entered into any necessary contracts to enable it to sell programs at other race tracks is in direct conflict with the evidence. It ignores the substantial evidence of contracts with TRA and PRA at both Golden Gate Fields and Bay Meadows. It ignores the request of Mr. Jimmy Kilroe that it as published for Santa Anita and Hollywood Park (ER. 231-232). That Mr. Kilroe did not contract for the Super Program in August, 1973 for the two Southern California tracks was not because of any past faults, any lack of

accuracy, any inability to fit a market need; but to the contrary, only because the owner of the Daily Racing Form, Mr. Annenberg, had coercively demanded from Mr. Kilroe's superiors, the owners of the track, to stay away from the Super Program (ER. 231-232). That plaintiff possessed the fixed asset capacity and capability to expend its working assets is shown by its ability to have serviced the meeting at Golden Gate Fields, the Sonoma County Fair and TRA meeting at Bay Meadows. Finally, the evidence is that the petitioner raised substantial funds and kept itself in operation because it had the ability to so raise funds. To find that it did not have such ability after its remarkable showing of raising almost $500,000.00 constitutes weighing the evidence. CJC's boycott killed its willingness to continue in operation on November 2, 1973. The wrongful acts of CJC as attributable for the determination not to continue its nationwide plan becomes, then, at the least, a

matter for the jury. As stated in Heatransfer Corp. v. Volkswafenwerk, A.G. et al., 553 F.2d 964, 988 (5th Cir. 1977), cert. denied, 434 U.S. 1087 (1978), in adopting the trial court's reasoning, at fn. 20:

> However, the Court does not believe that a going concern which is the victim of an anti-competitive practice, must forego damages for sales it would have made as the result of the natural expansion of its business simply because it was victimized early in its existence before its attempts to expand could ripen into evidence of prepareness and intent to increase its output.

Since CJC intended to destroy P.E. in all of its plans, the law presumes that the inability to achieve additional successes is the result of an intended plan. It is only a matter of defense whether conditions apart from the intended consequences were, in fact, the cause of the failure. This Court in J. Truett Payne v. Chrysler Motors Corp., 451 U.S. 557 (1981) has established that causation, as the case with damages, is subjected to

a lesser burden of proof. The Court stated, p.565:

> Petitioner nevertheless asked us to consider the sufficiency of its evidence in light of our traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury.

The J. Truett Payne decision declined to affirm the plaintiff's estimates of damage because the appellate court had not reached the violation issue. Violation, then, cannot be ignored in setting the judicial standards for the adequacy of evidence on the dual issues of causation and damages. Because of the stipulated intent of CJC to eliminate P.E. from the market, the decision below is in direct conflict with J. Truett Payne. As the court noted in Heatransfer, supra, the issue of future expansion is when wrongful acts are proven reduced to whether the jury is asked to engage in speculation and guess work. The law, then, provides no obstacle over the right of petitioner to obtain lost nationwide profits.

4. CJC clearly caused the loss of income and profits by P.E. at Bay Meadows.

The chronology of facts, supra, showing the barring of P.E. from the racing office, CJC's initial refusal to allow any sales; CJC's determination to view it as a tout sheet, CJC's entering into a plan with Mr. Goldberger to use picketing as an excuse to prevent on track sales, CJC's acquisitions of real property to preclude off track sales establish the exclusionary intent. This intent together with the natural tendency of these acts cause injury allows P.E. to obtain lost income. The books and records of P.E. do not establish causation; the issue is decided by what CJC did to constantly thwart P.E.

B. The Trial Court Erred In Limiting Causation to November 2, 1973.

1. Limitations determine the amount of damages, not the relevancy of of evidence of violation of the antitrust laws nor the proximately caused damages suffered.

The determination of the trial court to require a party subjected to the type of plan here to prove causation within the confines the statute of limitation and the last day of business operations is in direct conflict with the interpretation of the antitrust laws as involving a public policy to deter interferences with entry into the market place. The statute has been given an interpretation designed to carry out this Congressional purpose. Accordingly, the trial court's use of the statute of limitation to limit the proof of causation is in direct conflict with this Court's determination in Continental Ore Corp. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962). This court has held that evidence concerning proof of violation can not to be based on an arbitrary cut off period but only on the relevancy of the evidence to the issue of violation. In Zenith Radio Corp v. Hazeltine Research Inc., 401 U.S. 321 (1971) this Court held that the type of violation and

its impact with regard to the difficulty of proof of damages suspended the statute of limitations. To the contrary, the test below views the statute of limitations as allowing disregard of all evidence proving violation and causation outside its scope. Zenith Radio Corp. (1971) precludes the courts from adopting an arbitrary date governed by the date of filing a suit as the date from which causation is to be proved and answers the first appellate court's footnote as to whether the statute of limitations is tolled pending a series of acts designed to crush a competitor until the damages are finally determinable. Damages arising because a company has ceased to operate a business cannot be determined until the business ceases to operate. Since the statute of limitations does not commence to run until that date, all events which contributed to its cessation are relevant. This is the express holding of the Zenith Radio Corp.

II.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE LAW OF DAMAGES IN PRIVATE ANTITRUST CASES.

A. The Relevant Data as to Sales of the Super Program and CJC Program and CJC Programs for the Period Oct. 31, Nov. 1 and Nov. 2, 1973 Allow a Reasonable Estimate of Damages Suffered on These Three Days.

The relevant data applicable to determining how many sales P.E. would have made of the Super Program may be based on past sales at the meetings of TRA and PRA. The precise volume of sales was placed in the record by counsel for defendant who, indeed, established their foundation (ER. 774). CJC's sales of its small program is also relevant data. It is only argument whether Super Program would have entirely replacedCJC's program, or would have sold at least 40 percent of the attendance figure or 26 percent of the sales. Since all the relevant data was before the court Rule 56 could not be applied to defeat these damage claims.

B. The Value of a Business May Be Measured by its Capital Stock Upon Incorporation in a Case Involving the Intentional Destruction of a Business.

The relevant data on the issue of the value of the petitioner's business was also placed into evidence by the defendant. The record showed the capitalization of the corporation on incorporation (ER. 607-615); the value of the business on October 31, 1973 (ER. 639); the amount of the loans granted the corporation by its stockholders (ER. 751-752). It was shown that P.E.'s accountants properly valued the research library and track rights as $180,000.00 and established good will at $126,308.00 (ER. 639). The over subscription to stock allowed these valuations, and they were not challenged. The month by month receipt of capital contributions or loans was also placed into evidence by defendant showing the exact amount of contribution, the name of the person and the totals (ER. 606). The learned court below

indicated that the petitioner's records were in poor condition. But the summary judgment in the trial court assumed the accuracy of the records of the petitioner (Appendix D). As such, the learned court of appeals has failed to apply the principle that a motion based on the sufficiency of the evidence allows use of the entire record and all of its inferences regardless of rulings on admissibility and which party makes the offer. Continental Ore Corp. v. Union Carbide and Carbon Corp., supra, Bradford Audio Corp. v. Pious, 392 F.2d 67, 73 (2nd Cir. 1968). As a matter of Congressional will CJC should be required to return P.E. to the financial condition which it had at incorporation on July 11, 1973 (ER. 613-615).

C. The Relevant Data as to Lost Profits at Bay Meadows Disclosed an Ability to Make Profits by P.E.

Defendant did not argue with basic factual propositions involved here; that P.E.'s break even point, granting all

costs expended, including those for a nationwide operation, was $4,183 per day, exclusive of program seller's costs, and that the potential market at Bay Meadows, based on CJC's schedule of units sold (ER. 584-585), was $408,833 (ER. 585). But, clearly, what ratio of sales to units sold by CJC would have been is argument; the format, appearance, totality of information given by the Super Program would be compared to the small program of CJC. This is a jural function based on the evidence. The decision below is in conflict with cases which support the proposition that the profits made by the defendant as a result of its successful but unlawful plan may be awarded the plaintiff. Fishman v. Wirtz, 594 F. Supp. 853 (N.D.Ill. 1984) citing, among others, Twentieth-Century Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846 (8th Cir. 1952); Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798 (1st Cir. 1964); Household Golds Carriers' Bureau v.

Terrell, 417 F.2d 47 (5th Cir. 1969); Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982); McConnell, The Treble Damage Action, 1950 U.Ill L.F. 659 (1950). In not allowing plaintiff to utilize CJC's sales as a yardstick the courts below are in conflict with the principles charted by this Court awarding damages to injured parties.

D. The Relevant Data as to the Potential Profitability of P.E. as a Nationwide Publisher Provides a Reasonable Basis for the Estimate of Damages Suffered.

There exists no dissent from the factual showing that Mr. Akins contemplated operating on the tracks disclosed in its nationwide track study; that his plan was to go across the country in sections starting with the West; that he anticipated raising capital from backers; that it was not destined to be profitable early in its history (ER. 700-706). He did, in fact, send a letter and a sample program to operators of race tracks throughout the

country (ER. 703). The investment of over $500,000.00 in P.E., its actual preparation and publication of a lauded program and the needs of the industry for such a publication, make these damage estimates reasonable and admissible. Rule 56 prevents this matter from being resolved in summary judgment in view of this record.

III.
THE FAILURE TO ALLOW THE ENTRY OF JUDGMENT FOR THE PLAINTIFF IS IN CONFLICT WITH THE PURPOSES OF THE SHERMAN ACT AND THE RULES GOVERNING THE PRIVATE ACTION.

A. An Admitted Violator of the Antitrust Laws Who Has Been Proven to Have Caused Some Injury to a Plaintiff Cannot Obtain Judgment Under Section 4 of the Clayton Act.

1. Petitioner proved the fact of injury and became entitled to an award of costs and attorney fees thereby.

It is respectfully submitted the failure to have awarded judgment to plaintiff or to allow a trial in the event defendant withdraws its stipulation as to its violative intention, plan and conduct places the judiciary in conflict with

Congress. The damage actions are not only suits for damages but part of a broader Congressional scheme to prohibit restraints on any part of interstate commerce. Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959); Radovich v. National Football League, 352 U.S. 445 (1957). In Aspen Skiing Co. v. Aspen Highlands Skiing Corp., __ U.S. 105 S.Ct. 2847 (1985), the Court stated, p.2859:

> If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory.

Admitted predatory conduct with injurious impact cannot be allowed to result in a judgment for the predator. Congress has encouraged the filing of the private action. The plaintiff, who proves the essential elements of a cause of action, is entitled to judgment as a matter of Congressional will. Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, 666 F.2d 1130 (8th Cir. 1981); Knutson v. Daily Review, 468 F.Supp. 226 (N.D. Cal

1979), aff'd, 664 F.2d 1120 (9th Cir. 1981).

CONCLUSION

The attempt of the courts below to require proof of causation apart from the tendency of wrongful acts to injure a business must be rejected and a writ should be granted petitioner.

Dated: _____ __, 1985.

Respectfully submitted,

_____
Maxwell Keith
Attorney for Petitioner

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PROGRAM ENGINEERING, INC., a corporation, Plaintiff-Appellant, v. TRIANGLE PUBLICATIONS, INC., a corporation, DAILY RACING FORM, INC., CALIFORNIA JOCKEY CLUB, et al., Defendant-Appellees.	Nos. 84-2187, 84-2264 D.C. No. CV-77-2454-SW MEMORANDUM* [Filed June 18, 1985]

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Appeal from the United States District Court for the Northern District of California
Honorable Spencer Williams, District Judge, Presiding
Argued and Submitted April 11, 1985, San Francisco, California

Before: HALL and WIGGINS, Circuit Judges, and JAMESON,** District Judge

In these consolidated appeals, Program Engineering, Inc. (PE) seeks review of summary judgment entered in its antitrust action. The district court held that even assuming, arguendo, that appellee California Jockey Club (CJC) violated the antitrust laws, the record clearly showed that PE's damages did not result from the violation.[1/] We affirm.

** Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

1/ Defendants-Appellees Triangle Publications, Inc. and Daily Racing Form, Inc. are not participants in this appeal. We affirmed the district court's grant of summary judgment for them in Program Engineering, Inc. v. Triangle Publications, Inc., 634 F.2d 1188 (9th Cir. 1980).

I.

JURISDICTION OVER APPEALS

Initially, we conclude that we lack jurisdiction over the first of these two appeals, No. 84-2187. PE filed a motion for reconsideration after announcement, but before entry, of the judgment. PE filed its first notice of appeals before the court denied the motion.

Because PE's motion for reconsideration sought a "substantive change of mind by the court," it is properly characterized as a motion for relief under Fed. R. Civ. P. 59(e). Miller v. Transamerican Press, Inc., 709 F.2d 524, 527 (9th Cir. 1983). A Rule 59(e) motion, if timely, tolls the time for filing a notice of appeal until the court has ruled on the motion and voids a previously-filed notice of appeal. Fed. R. App. P. (4(a)(4); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982); Bestran v. Eagle Comtronics, Inc., 720 F.2d 1019, 1019 (9th Cir. 1983).

PE's motion was timely. See 9 J. Moore, Moore's Federal Practice ¶ 204.12[4] at 4-84. Cf. Calculators Hawaii, Inc. v. Brandt, 724 F.2d 1332, 1335 (9th Cir. 1983) (motion for relief under Fed. R. Civ. P. 52(b); Fed. R. App. P. 4 (a)(2) (notice of appeal filed between announcement and entry of judgment is timely).

Moreover, there is no suggestion that the entry of judgment was intended to be a denial of the motion. See Moore's Federal Practice, supra, ¶ 204.12[4] at 4-84-4-85 (entry of judgment should never be treated as implied denial). Cf. Calculators Hawaii, Inc., 724 F.2d at 1335 (district court's subsequent consideration and express denial in light of newly proffered evidence showed that entry of judgment was not implied denial).

Accordingly, the notice of appeal is void. We dismiss appeal No. 84-2187 for lack of jurisdiction.

PE timely filed a second notice of appeal from the denial of the motion. Thus, we have jurisdiction over the second of the two appeals, No. 84-2264.

II.

ANTITRUST ISSUES

We affirm the district court's grant of summary judgment for two reasons. First, we reject PE's contention that law of the case precluded summary judgment on the causation of damages issue. In the prior appeal in this case, we held that summary judgment was inappropriate on the issue of whether CJC had engaged in anti-competitive conduct. Program Engineering, Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1196 (9th Cir. 1980). We did not consider whether such conduct, if it occurred, actually caused PE's injuries. Id. Because we did not decide the causation of damages issue in the prior appeal, the law of the case doctrine is inapplicable here. See Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 833-34 (9th Cir. 1982).

Second, PE has failed to point to a genuine issue regarding whether CJC's alleged antitrust violations caused PE's injury. We may reverse a grant of summary judgment only if there is a genuine issue of material fact, viewing the evidence in a light most favorable to the non-moving party. Walling v. Commissioner, 744 F.2d 674, 676 (9th Cir. 1984).

Injury to the plaintiff that was caused by the anticompetitive conduct is an essential element of an antitrust cause of action for damages. 15 U.S.C. § 15; Northwest Publications, Inc. v. Crumb, 752 F.2d 473, 476 (9th Cir. 1985). If a plaintiff fails to show that the violation caused his injury, he may not recover at all, even nominal damages. III P. Areeda & D. Turner, Antitrust Law ¶ 335 at 171 (1978). Cf. Northwest Publications, Inc., 752 F.2d at 476 (failure to show such injury precludes damage award). The burden on a plaintiff to show that the anticompetitive conduct caused him injury is more

stringent than the burden to show the amount of injury. Northwest Publications, Inc., 752 F.2d at 476-77; Antitrust Law, supra, ¶343 at 228.

Even if we assume that CJC engaged in anticompetitive conduct and view the evidence in the record in the light most favorable to PE, there is no genuine issue concerning whether CJC's conduct injured PE. PE's president testified that six months before CJC had an opportunity to injure PE, PE was in a state of financial chaos and that the chaos continued until PE went out of business. This state of financial chaos existed even during the months in which another San Francisco area racetrack had hired PE to print its official program and had given PE large cash advances. In addition, at the time PE went out of business, the Teamsters' Union was pressuring PE to pay its sizable arrearages in union dues and benefits, and the IRS had levied on PE's property to satisfy $40,000 in unpaid taxes. The

record suggests that the IRS had literally locked PE out of its own offices.

The only evidence in the record that even implies that CJC's conduct injured PE consists of PE's balance sheet, income and expense statement, and projections based on those two documents. These documents fail to raise a genuine issue concerning whether CJC's allegedly illegal activities caused PE's demise, however. PE's accountant prepared the documents from PE's unaudited financial records. The accountant admitted that the records, which were kept by an untrained bookkeeper, were in poor condition. These documents fail to create a genuine issue concerning whether CJC's conduct was the cause of PE's damages.

Because PE has failed to establish an essential element of a cause of action for damages, it cannot prevail. CJC is therefore entitled to judgment as a matter of law.

We affirm the judgment in appeal No. 84-2264. We dismiss appeal No. 84-2187 for lack of jurisdiction.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PROGRAM ENGINEERING, INC., a corporation, Plaintiff-Appellant, v. TRIANGLE PUBLICATIONS, INC., a corporation, DAILY RACING FORM, INC., CALIFORNIA JOCKEY CLUB, et al., Defendant-Appellees.	Nos. 84-2264 D.C. No. CV-77-2454-SW ORDER [Filed July 24, 1985]

Before: HALL and WIGGINS, Circuit Judges, and JAMESON,* District Judge

The petition for rehearing is denied.

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* Honorable William J. Jameson, Senior United Staets District Judge, District of Montana, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT FILED DEC. 1, 1980

PROGRAM ENGINEERING, INC., a corporation, RALPH B. AKINS, an individual,	No. 78-2556
	D.C. No. C77-2454
Plaintiffs-Appellants,	OPINION
v.	[Filed Dec. 1, 1980]
TRIANGLE PUBLICATIONS, INC., a corporation, DAILY RACING FORM, INC., a corporation, LOS ANGELES TURF CLUB, a corporation, HOLLYWOOD TURF CLUB, a corporation, CALIFORNIA JOCKEY CLUB, a corporation, NEWSPAPER AND PERIODICAL DRIVERS LOCAL NO. 921, an unincorporated association, JACK GOLDBERGER,	
Defendants-Appellees.	

Appeal from the United States
District Court for the
Northern District of California
Spencer Williams, District Judge,
Presiding
Argued July 9, 1980;
Submitted July 21, 1980

Before: CHOY, ANDERSON, and FARRIS, Circuit Judges. CHOY, Circuit Judge:

Appellants initiated a private antitrust action alleging that appellees conspired to violate and that three of the appellees did violate sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, by unfairly restraining trade and by monopolizing the national publication, for sale to the public, of information of past performances of thoroughbred racehorses. The district court granted summary judgment in favor of the appellees. We affirm in part and reverse and remand in part.

I. Facts

In 1972 Program Engineering began publishing horse racing information -- linking the past performances of horses with current program information, thereby

competing both with Daily Racing Form (Daily), a publisher of past performance information, and with programs sold by individual racetracks. Initially this publication was called "Super Racing Program" and then "Super Racing Guide" (Racing Guide). This publication was sold at Golden Gate Fields racetrack between February and June of 1973. By August 1973 the company was foundering.

In October 1973 Program Engineering attempted to sell the Racing Guide at Bay Meadows, a racetrack operated be California Jockey Club (CJC), but a dispute arose. On October 11, 1973 Program Engineering initiated a state court action seeking an injunction to prevent CJC from denying Program Engineering the right to compete in the marketplace. That case was settled by an agreement between CJC and Program Engineering allowing Program Engineering to sell the Racing Guide at Bay Meadows under certain conditions. About October

25 Ralph Akins (Akins), president of Program Engineering, was asked to leave Bay Meadows because of an alleged labor dispute.[1/]

Akins thereafter was granted permission to give away the Racing Guide on property near Bay Meadows that was leased by Foster Restaurants (Foster Restaurant property). People receiving the Racing Guide often would leave donations. On October 31, 1973 Akins was asked to get off the property because CJC had just purchased it.[2/]

Akins then obtained permission from Southern Pacific Railroad to sell the Racing Guide on a strip of land located inside the Bay Meadows racetrack (Southern Pacific property). On November 2, 1973 a representative of CJC went to Southern Pacific and, in effect, had that strip of land added to the existing Bay Meadows lease.[3/] On that same day Akins was told to get off the land.

November 2, 1973 was the last day that the Racing Guide was published. Program Engineering went out of business on December 1, 1973.

On October 31, 1977 appellants Program Engineering and Akins filed a complaint against appellees Triangle Publications (Triangle), Daily (owned by Triangle Publications), Los Angeles Turf Club (LATC), Hollywood Turf Club (HTC), CJC, Newspaper and Periodical Drivers Local No, 921 (Local 921), and Jack Goldberger (Goldberger), president of Local No. 921. The complaint alleged that the appellees had conspired to restrain trade in and to monopolize the publication, for sale to the public, of information regarding past performances of thoroughbred race- horses, in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1,2. The complaint additionally alleged that Triangle and Daily used their allegedly monopolistic market positions to exclude appellants from the business of

publishing horse race information for sale to the public and that CJC refused to deal with appellants.

On December 7, 1977 Triangle and Daily moved to dismiss the case pursuant to Fed. R. Civ. P. 12(b) (6). In March 1978 the district court dismissed the complaint with respect to Akins on the ground that he lacked standing to sue. The district court also found that any cause of action that accrued before October 31, 1973 was barred by the statute of limitation and limited discovery "to determining whether any overt act committed pursuant to the alleged conspiracy occurred between October 31 and December 1, 1973. Fed. R. Civ. P. 26(c) (4)."

In June 1978 Triangle, Daily, LATC, HTC and CJC moved for summary judgment. Program Engineering responded by moving to strike those portions of the summary judgment motions relating to the issues of conspiracy and damages on the ground that those issues had been excluded from

discovery by the district court's earlier order.

On July 14, 1980 the district court entered a final judgment, nunc pro tunc, as of June 30, 1978, granting summary judgment to all appellees. Program Engineering and Akins appeal.

II. Akins's Standing

Appellants assert that Akins has standing to pursue his claim for relief not only because he was President of Program Engineering but also because he was the originator of the Racing Guide and a contracting party with Program Engineering.

To have standing to sue under the antitrust laws, an individual must be within the target area of the antitrust violation, not merely incidentally injured thereby. Perkins v. Standard Oil Co., 395 U.S. 642 (1969). Shareholders, officers, and employees of corporations generally do not have standing to sue; the loss of salary is "merely incidental to the

alleged antitrust violation and was not within the area of the economy that the defendants should have foreseen would be affected by its violation." Solinger v. A&M Records, Inc., 586 F.2d 1304, 1311 & n.8 to 1312 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979); see, Bosse v. Crowell Collier and Macmillan, 565 F.2d 602 (9th Cir. 1977).

In the complaint appellants allege that the object of the conspiracy was "to eliminate the business of the plaintiff Program Engineering" (emphasis added) and that Akins was injured only because of his loss of salary. The complaint does not mention that Akins was the originator of the Racing Guide or that he had a contractual arrangement with Program Engineering. Furthermore, there are no factual allegations demonstrating that Akins was in the target area of the alleged violations or that he was injured in any way other than as an employee of Porgram Engineering. Thus, Akins failed

to establish standing to sue, and the district court properly dismissed the complaint as to him.

III. Jurisdiction

Appellee HTC contends that in the complaint Program Engineering failed adequately to allege that the antitrust violations affected interstate commerce. This contention is meritless.

A complaint should not be dismissed for lack of jurisdiction unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McLain v. Real Estate Board, 444 U.S. 232, 246 (1980 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). "[T]he jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on commerce' theory." Id. at 242. Initially a plaintiff must allege the critical relationship to interstate commerce. Id. Only if these allegations are disputed

must the plaintiff submit evidence that the defendant's activity is in interstate commerce or that it has some effect on another activity in interstate commerce. Id.

The complaint herein alleges that Triangle owns Daily which publishes past performance racing information that Daily sells to the public nationally, including at appellees' racetracks. Furthermore, according to the complaint, such publication "involves a constant and continuous stream of interstate commerce ... because thoroughbreds race at tracks throughout the United States and information concerning their workouts and performances at meets in the various states are [sic] collected for use by the publishers" by means of interstate communications. These allegations are not controverted by any of the appellees.

At this stage of the proceedings there are sufficient allegations to allow Program Engineering to proceed to trial.

Both racetracks and publishers of racing information, of necessity, are involved in and have some effect on the commerce of racehorses that are bred, raised, and raced throughout the United states. Unless the proof at trial establishes the contrary, the district court does not lack jurisdiction.

IV. Summary Judgment

Program Engineering contends that summary judgment was inappropriate in this case on the grounds that discovery had been limited to the threshold issue "whether any overt act committed pursuant to the alleged conspiracy occurred between October 31 and December 1, 1973"; that there were material issues of fact; and that the statute of limitation did not commence running until Program Engineering was out of business.[4/]

As a general rule summary judgment is disfavored in complex antitrust litigation, particularly where, as in a conspiracy action, extensive factual

determinations must be made with respect to the issue of intent. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); Beltz Travel Service, Inc. v. International Air Transport Ass'n, 620 F.2d 1360, 1364-65 (9th Cir. 1980). Summary judgment is proper only where the moving party has shown that there is no genuine issue of material fact or where, viewing the evidence and the inferences that can be drawn therefrom in the light most favorable to the opposing party, the moving party clearly is entitled to prevail as a matter of law. See Fed. R. Civ. P. 56(c); Vaughn v. Teledyne, Inc., No. 78-2309, slip op. 16, 19-20 (9th Cir. Sept. 17, 1980); British Airways Board v. Boeing Co., 585 F.2d 946, 950-51 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). Where the moving party has net its burden, the opposing party must present specific facts demonstrating that there is a factual dispute about a material issue. Id. at 951-52.

Program Engineering did not file any affidavits or other evidence in response to the motions for summary judgment. It filed a motion to strike all portions of the motions for summary judgment that dealt with the issues of conspiracy and damages and a memorandum in opposition to the motions for summary judgment. Even though Program Engineering failed to respond properly to the motions, summary judgment may be entered against it only "if appropriate." Fed. R. Civ. P. 56(e).

A. Discovery[5/]

The district court's order of March 1978 limited discovery "to determining whether any overt act committed pursuant to the alleged conspiracy occurred between October 31 and December 1, 1973." Program Engineering argues that this order should be construed to mean "assuming arguendo that there was a conspiracy, did any overt act occur during the limitation period?" Under this interpretation the district court's inquiry on the motions for summary

judgment properly should have been limited to the question of timeliness.[6/] Thus, according to Program Engineering, the district court went beyond the bounds of its original order by concluding that there was no genuine issue of material fact and that appellees were entitled to judgment as a matter of law. Program Engineering contends that this conclusion was premature and that it is entitled to further discovery.

When the party opposing a motion for summary judgment cannot present "facts essential to justify his opposition" to the motion, Fed. F. Civ. P. 56(f) authorizes the party to submit an affidavit stating his reasons. The court then has the discretion to order a continuance to permit discovery. Generally where a party has had no previous opportunity to develop evidence and the evidence is crucial to material issues in the case, discovery should be allowed before the trial court rules on a

motion for summary judgment. See British Airways Board v. Boeing Co., 585 F.2d at 954; accord George C. Frey Ready-Mixed Concrete v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 555 (2d Cir. 1977).

Program Engineering did not submit any affidavits pursuant to Fed. R. Civ. P. 56(f) or move for a continuance to allow additional discovery. Nonetheless, we find that the motion to strike was sufficient to raise in the lower court the issue whether Program Engineering was entitled to additional discovery.

We find nothing to support Program Engineering's interpretation of the discovery order or to require that further discovery be allowed. The allegations of conspiracy in the complaint are mostly mere conclusory statements, enough to survive a motion to dismiss, but not enough to support the suggested construction of the district court's discovery order. With only such allegations before it and in light of the

subsequent grant of summary judgment, the district court undoubtedly intended that the discovery be limited not to uncovering only overt acts committed within the statute of limitation, as appellants contend, but to uncovering overt acts "committed pursuant to the alleged conspiracy," (emphasis added) thereby allowing inquiry into the conspiracy issue, as appellees contend.

Furthermore, appellants were not prevented from pursuing full discovery during the many months preceding the order limiting discovery. Yet, they point to no information or evidence discovered during that time that even suggests an inference of a conspiracy.[7/] Nor does Program Engineering state what depositions it wants to take, what other specific evidence it hopes to discover or the relevance of that evidence to its claims.

The discovery order did not mention the allegations of substantive violations, but Program Engineering also failed to

explain what further discovery would reveal that is "essential to justify [its] opposition" to the motions for summary judgment on these issues. See Fed. R. Civ. P. 56(f).

Under these circumstances Program Engineering was not entitled to additional discovery before the lower court ruled on the motions. See British Airways Board v. Boeing Co., 585 F.2d at 954-55.

B. Statute of Limitation

Under 15 U.S.C.§ 15b, an antitrust action is barred unless commenced within four years after the cause of action accrued. A cause of action accrues each time a plaintiff is injured by an act of the defendants. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-39 (1971); In re Multidistrict Vehicle Pollution, 591 F.2d 68, 73 (9th Cir.), cert denied, 444 U.S. 900 (1979). A plaintiff need not show that the conspiracy itself occurred within the limitation period. See Zenith Radio Corp.

v. Hazeltine Research, Inc., 401 U.S. at 338-39.

Appellants have not shown that either Triangle or Daily committed the alleged substantive antitrust violations within the limitation period. In fact, appellants have alleged no acts by either after October 31, 1973. Thus, those claims were barred.

It is not disputed that while Akins was prohibited from selling at Bay Meadows, he was allowed to distribute, without selling, the Racing Guide on the Foster Restaurant property. When CJC purchased the property, however, Akins (within the limitation period) was asked to leave. It is also not disputed that within hours of the time that Akins began selling the Racing Guide on the Southern Pacific property, CJC contacted Southern Pacific about leasing the property and asked Akins to leave.

Program Engineering asserts that CJC's actions, together with the ejections

of Akins, are overt acts committed with an unlawful intent pursuant to the alleged conspiracy, as well as a refusal to deal by CJC and that they were committed within the limitation period. Appellees contend that because their evidence demonstrates that these acquisitions and ejection were for legitimate business reasons, summary judgment was proper . Having established that CJC committed certain overt acts within the limitation period, the appellants could avert a summary judgment by showing that there is a genuine issue of material fact relevant to whether the acts were antitrust violations.

C. Issues of Material Fact

"A party opposing a motion for summary judgment must introduce 'sufficient evidence supporting the claimed factual dispute *** to require a jury or judge to resolve the parties' differing versions of the truth at trial.' . . . A mere scintilla of evidence will not do, for a jury is permitted to draw

only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." British Airways Board v. Boeing Co., 585 F.2d at 952 (citations omitted).

1. Conspiracy

Once allegations of a conspiracy have been rebutted by probative evidence showing alternative, legitimate business reasons for the defendants' conduct, to avoid summary judgment the plaintiff must come forward with specific factual support for its allegations. Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 671 (9th Cir. 1980); First National Bank v. Cities Service Co., 391 U.S. 253, 280 (1968). Because conspiracy is rarely susceptible of direct proof, a plaintiff must rely on circumstantial evidence. Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d at 671. Nonetheless, the evidence must be sufficient to infer an agreement among the defendants (whether express or implied) to take some concerted

action. See L. Sullivan, Antitrust at 317 (1977).

Program Engineering asserts that the appellees united to destroy its business, but presents very little evidence linking the appellees together in any way.[8] In fact, Akins admitted in his deposition that he had "no direct knowledge of . . . an agreement," but that he had merely a belief that one existed. Such a belief is insufficient.[9]

The appellees deny that any conspiracy exists. Legitimate business reasons were proffered for each of the allegedly conspiratorial acts. Even viewing the evidence in the light most favorable to the appellants, we cannot conclude that Program Engineering has sufficiently rebutted the appellees' evidence to raise a genuine issue of material fact. Thus, the district court properly granted the motion for summary judgment on the claimed conspiracy.

2. Substantive Violations

"Although a company may ordinarily deal or refuse to deal with whomever it pleases without fear of violating the antitrust laws, refusal to deal which is anticompetitive in purpose or effect, or both, constitutes an unreasonable restraint of trade in violation of the Sherman Act," even when justified by a legitimate business reason. Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1300 (9th Cir. 1978) (judgment notwithstanding verdict reversed) (citations omitted). Whether a defendant refused to deal and, if so, whether the refusal was a product of an anticompetitive motive are factual issues that should not be taken from the jury "unless 'the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict.'" Id. (citations omitted).

Here, the purchase of the Foster Restaurant property was negotiated and completed prior to October 31, 1973, and

the property was well-located for expanding the available parking space for Bay Meadows. Nevertheless, Akins was forced off of the property before the deed was recorded and appellees have shown no legitimate business reason for such an immediate ouster.

The lease of the Southern Pacific property also had a legitimate basis. The Southern Pacific property was within Bay Meadows racetrack, had been used by the racetrack for many years, and was excluded from the lease apparently only through an oversight. Even Akins admitted the property was essential for CJC's operation, Additionally, there may have been a legitimate reason for ejecting Akins from the racetrack, since Local 921 (through its president Goldberger) allegedly had threatened to strike Bay Meadows if Program Engineering were allowed to sell the Racing Guide there.

Despite the apparent legitimacy of CJC's actions with respect to these two

occurrences, we find that, viewing the evidence in the light most favorable to appellant Program Engineering, there is a genuine, material issue as to whether these acts were substantive violations of the antitrust laws, i.e., a refusal to deal. The timing of CJC's acts in relation to prior events and to Program Engineering's demise, raises an inference that there was such a violation. In October 1973 Akins and Program Engineering initiated their state court action against CJC on the ground that CJC had refused to allow Program Engineering access to information necessary to publish the Racing Guide and had interfered with its distribution at Bay Meadows, although the Daily Racing Form and the racetrack programs were being sold there. This suit was settled by an agreement between CJC and Program Engineering that provided that Program Engineering be allowed to sell the Racing Guide at Bay Meadows. Yet, in that same month Akins again was informed that

he could not sell the Racing Guide there, this time because of an alleged labor dispute.

For no stated reason Akins was forced off the Foster Restaurant property the same day that CJC's purchase of that property was finalized. Program Engineering last printed the Racing Guide in November 1973 and shortly thereafter went out of business. These facts at least suggest that within the limitation period Program Engineering was injured by the actions of CJC and that the actions may have been motivated by an unlawful intent or may have had an anticompetitive effect. Thus, summary judgment was inappropriate on this claim for relief.

V. Conclusion

Appellants failed to present any evidence in the lower court that Akins was in the target area of the antitrust violation or that he was injured in any way other than by his loss of salary. Thus, we affirm the district court's order

dismissing the complaint as to Akins on the ground that he did not have standing to sue.

A plaintiff must have some factual basis for an antitrust action before the suit is filed; he cannot expect the discovery process to reveal evidence of a violation that he merely suspects. The evidence and inferences that may be drawn therefrom in support of appellants' contentions in this case are very weak. In fact, appellants have presented no evidence that supports their allegations that Triangle and Daily, within the statute of limitation, "used [their] monopolistic position[s] to exclude [Program Engineering] from the business of publishing horse race meeting information" or that any of the appellees conspired against Program Engineering. Thus, the order granting summary judgment is affirmed as to these claims.

We reverse as to the claim that CJC refused to deal with Program Engineering,

on the ground that the issue presents a factual question that is not appropriate for summary judgment.

AFFIRMED in part and REVERSED and REMANDED in part, for further proceeding consistent with this opinion. The parties shall bear their own costs on this appeal.

FOOTNOTES

1. [reference on page 2]

The terms of the settlement agreement between Akins and CJC provided:

> Program Engineering, Inc., will be responsible for solving all of its labor problems that arise during the current meet. If at any time California Jockey Club is threatened with a strike, walk-out or direct or informational picketing by Engineering, Inc. is on the race track premises, then in that event California Jockey Club reserves the right to exclude Program Engineering, Inc. from the premises until such labor problems are solved . . . and Program Engineering, Inc. agrees to vacate the premises pending said solution.

2. [reference on page 2]

CJC agreed to purchase the property on October 15, 1973. The deed was signed on October 29, 1973, and recorded on October 31, 1973.

3. [reference on page 2]

Akins admitted that this strip of land was "absolutely mandatory for [CJC's] continuance of operations."

4. [reference on page 6]

Finding, as we do in part III.B, that within the limitation period CJC acted in such a way as to stop the sale of the Racing Guide and that the evidence of such is sufficient to preclude summary judgment on the issue of timeliness, we do not reach the issue whether the statute of limitation was tolled until Program Engineering

ultimately went out of business. Cf. Hanson v. Shell Oil Co., 541 F.2d 1352, 1362 n.9 (9th Cir. 1976), (court rejects argument that damages not ascertainable until business closed), cert. denied, 429 U.S. 1074 (1977).

5. [reference on page 7]

Program Engineering does not challenge the order limiting discovery. The district court properly granted Triangle's and Daily's motions to limit discovery to the threshold issue of timeliness. See Fed. R. Civ. P. 26(c)(4).

6. [reference on page 7]

Under this interpretation the district court misstated the timeliness issue. Under Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-42 (1971), a plaintiff may recover for acts violating the antitrust laws that were committed before the limitation period, provided that the damages from such acts accrued and became ascertainable during the limitation period.

7. (reference on page 9]

It does not appear that discovery after the order was entered was in fact limited as severely as appellants' interpretation of the order would require.

8. [reference on page 11]

The evidence offered in support of the conspiracy that involved appellees other than CJC consists of: (1) a letter from Triangle to Golden Gate Fields (not a party in this action) regarding a possible copyright infringement by an unidentified publication; (2) the refusal of program sellers to sell the Racing Guide, allegedly at the insistence of a nonparty

coconspirator; and (3) alleged conversations between Walter Annenberg, of Triangle, and Mervin LeRoy, of HTC, and between Leroy and James Kilroe, of LATC, regarding Program Engineering's access to the racetracks. Kilroe denied having any conversation concerning the alleged conspiracy.

9. [reference on page 11]

Appellants argue that this case falls within the Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939), "conscious parallelism" doctrine, but have not shown that two or more appellees "acted in the same way, each aware of the other's doings"; nor have they shown any of the "plus factors" generally required under this doctrine. See L. Sullivan, Antitrust at 317 (1977).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PROGRAM ENGINEERING, INC. a California corporation, Plaintiff, v. CALIFORNIA JOCKEY CLUB, a California corporation, Defendant.	C 77-2454 SW ORDER GRANTING IN PART, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR ORDER GRANTING ACCESS TO INTERNAL REVENUE RECORDS

[Filed January 20, 1984]

ORDER AND MEMORANDUM OF LAW

Upon consideration of this Court of the briefs and arguments submitted upon the defendant's motion for Summary Judgment on the issues of causation and

damages, or for partial summary judgment, IT IS HEREBY ORDERED THAT defendant's motion for partial summary judgment is GRANTED. Additionally, to the extent that defendant's motion has been denied, without prejudice, it is this Court's order that certain relevant IRS records be released forthwith, under appropriate protective order, to the defendant for purposes of substantiating the already briefed and noticed motion in limine regarding the issues this Court describes below.

Introduction

This action was filed before this Court on October 31, 1977, alleging a grand conspiracy to destroy Program Engineering, Inc. ("plaintiff"). Plaintiff charged that the Daily Racing Form monopolized the market for guides to the past performance of thoroughbred racehorses and had enlisted various co-conspirators to boycott plaintiff's Super Racing Program -- an allegedly competitive racing guide. As part of this vast conspiracy, the de-

fendant, as owner and operator of Bay Meadows Race Track, allegedly refused to deal with the plaintiff, thus frustrating its competition with the Daily Racing Form.

This Court granted summary judgment on defendant's behalf on all four of plaintiff's claims premised upon both the Sherman Act §1 and 2. The Ninth Circuit affirmed this Court's order, save for the refusal to deal allegation against defendant. Program Engineering, Inc, v. Triangle Publications, Inc., 634 F.2d 1188, 1196 (9th Cir. 1981). This reversal was based upon the Circuit's view that, although the defendant's act of renegotiating its master lease with Southern Pacific to include the sliver of land from which the plaintiff distributed his Program appeared "legitima (te), ... there was genuine, material issue as to whether these acts were substantive violations ..., i.e., a refusal to deal." Id.

Nonetheless, this Court did consider, and grant, summary judgment on the issue of monopolization, ruling that plaintiff's failure to adequately define a relevant product or geographic market in which the defendant precluded its participation foreclosed that issue at trial. Order, filed December 2, 1982. However, we did rule that since the three elements of attempted monopolization: intent, conduct, and likelihood of success

> are intertwined and, since (evidence of intent and probability of success) may be inferred from evidence of anticompetitive conduct, it is difficult to see how the matter can be resolved on a motion for summary judgement.

Id. at 2. However, defendant's present motions, to the extent that they challenge the legal sufficiency of plaintiff's damage theories, do present matters appropri-

ately disposed of upon summary judgment. See Ways & Means, Inc. v. IVAC Corp., 506 F. Supp 697 (N.D. Cal. 1979); c.f., Shannon v. Crowley, 538 F. Supp. 476 (N.D. Cal. 1981) (motion in limine); Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847 (N.D. Cal. 1978) (JNOV); ILC Peripherals Leasing Co. v. International Business Machines Corp., 458 F. Supp. 423, 434-6 (N.D. Cal. 1978), aff'd, 636 F.2d 1188 (9th Cir. 1980).

Statute of Limitations

While we find defendant's "repackaging" of its statute of limitations defense appealing at first blush, we must reject it. Clearly, defendant contends that it was the labor pickets on Oct. 25, 1973, coupled with the IRS liability, which spelled the plaintiff's doom, and that, as a matter of law, the sole act which the Circuit deemed within the limitations period did not amount to a new refusal to deal, but simply a continuation of the pre-limitations period behavior. Plain-

tiff's retort is absurd: this Court cannot draw upon a "hornbood rule" that a cause of action for refusal to deal intended to destroy a business continues until the final cessation of the business. Similarly, we do not deem the Ninth Circuit's reservation of the issue of whether plaintiff's damages could survive the limitations cutoff because it had not finally ceased doing business as preclusive of our considering the amount of damages inflicted upon plaintiff after October 31, 1973. Program Engineering, supra at 1191-92. C.f., Orgell, Inc. v. Gray's Stores, Inc., 640 F.2d 936 (9th Cir. 1981).

Nonetheless, defendant's pas de deux must fail here, as poised upon highly controverted issues of anticompetitive intent and admittedly ambiguous conduct. Id. at 1196. A jury could reasonably find either that the defendant's action in renegotiating the lease with Southern Pacific represented a continuation, a reversion, or

even a qualitatively different level of refusal to deal with the plaintiff that occasioned some non-speculative amount of damages within the limitations period.

Causation

Here, the defendant argues that it was the IRS padlocking the plaintiff's door for its failure to satisfy employee withholding tax liability, not its refusal to deal with the plaintiff, which caused plaintiff's ultimate closure. While this Court takes due note of the plaintiff's tremendous accrued tax liability, both the matter of the plaintiff's indebtedness to the United States Treasury, as well as the fatal effect of that indebtedness are matters of unverified fact, inference, or both.

while we do not preclude defendant's argument, once substantiated by sufficient evidence culled from the IRS 's records, we cannot at this time accept either as undisputed that the plaintiff's failure was solely and independently caused by its

liabilities to the IRS on or before October 31, 1973, nor can we say that by highlighting such liability, defendant may be exonerated from any contributory responsibility during the interim of October 31, 1973 to the date plaintiff ceased publication or sale. See, e.g., Jos. Seagram & Sons, Inc. v. Haw. Oke & Liquors Ltd, 416 F.2d 71 (9th Cir. 1969), cert. den. 396 U.S. 1062 (1969).

Individual damage claims

Assuming that (1) defendant engaged in anticompetitive acts by entering into the Southern Pacific lease -- during the limitations period; and (2) summary judgment on either the continuing refusal to deal limitations argument, or causation is inappropriate, then summary judgment, in whole or in part, would still be appropriate, in view of the failure of plaintiff's evidence on the theory and amount of damages.

There is an initial presumption against grant of summary judgment on dam-

ages, when the parties present contradictory views of causation and amount of damages at the pleading stage; it is within the province of the jury to determine if, and to what extent, defendant's behavior caused plaintiff's damage. However, notwithstanding this heavy burden, we can grant summary judgment on the admissibility or relevancy of certain forms of damage calculation, if these calculations are so un reliable or flawed that they could not properly form the basis of a reasonable jury verdict. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 691 F.2d 1335 (9th Cir. 1982).

Such is the case here with plaintiff's claims 1, 2, 3 and 5. We discuss each claim in light of the two fundamental objections interposed by defendant: (1) causation: why the particular formulation of damages could not reasonably be traced to the sole arguably anticompetitive act within the limitations period; and, (2)

theoretical or definitional: why the approach to quantifying its damages has required that plaintiff stretch both accounting and legal theory beyond its logical elasticity.

> Claim 1: Loss of all "business value" upon the "forced closure of the plaintiff's business -- $484,334.00.

That which plaintiff calls "business value" apparently represents the sum of the capital accounts (shareholders' equity) and outstanding loans to the business. This is not a valid measure, as a matter of law; the appropriate method by which to value a business is either by its "going concern value", the net present value of its discounted future income stream, or by its "liquidation value", the value of its assets upon dissolution of the enterprise. Clearly, the plaintiff's proffer of "business value" approximates neither of these measures. Thus, without reaching the matter of causation, the the-

oretical non sequiturs which abound in Claim 1 render it susceptible to summary judgment. Standard Oil Co. v. Moore, 251 F.2d 188, 220 (9th Cir. 1957); also see, e.g., Knutson v. Daily Review Inc., 383 F. Supp. 1346, 1387 (N.D. Cal. 1974), reversed in part, on other grounds, 548 F.2d 795 (9th Cir. 1976).

Claims 2 and 3: Profits from lost nationwide sales

These claims, based almost entirely upon the affidavit of Atkins and virtually unsupported by objective evidence, should properly fall before defendant's motion for summary judgment. The pertinent section providing damages in attempted monopolization cases, permits recovery only for damages to plaintiff's "business or property". Courts uniformly require that an antitrust plaintiff establish that he was "prepared" to expand an existing business, before he may recover damages for being frustrated from so doing. Webb v. Utah Brokers Ass'n, 568 F.2d 670, 677 (10th

Cir. 1977); c.f., Murphy Tugboat Co, v. Shipowners & Merchants Towboat Co., Ltd., 467 F. Supp. 841, 863 (N.D. Cal. 1981); compare Neumann v. Vidal, et al., 1983-1 CCH Trade Cases ¶65,455 (D.C. Cir. 1983) (court specifically finds, as a matter law, upon the proffer of facts, that plaintiff would have been able to , and would have but for defendants' wrongful acts, have entered the business.) Unlike Neumann, plaintiff here has neither demonstrated any concrete steps taken toward the activities he claims were thwarted by defendant, nor demonstrates the financial wherewithal available to fund his enterprise, but for the defendant' actions. Accord, Parks v. Watson, 1983-2 CCH Trade Cases ¶65,632 (9th Cir. 1983).

Here, the uncontradicted record shows that (1) plaintiff's past experience at publishing this guide had been consistently unsuccessful; (2) that plaintiff had extinguished his current sources of funds, and would require a drastic influx of cap-

ital just to maintain current levels of operation; (3) plaintiff had never negotiated or entered into any of the necessary contracts to enable him to sell his guides at other racetracks; and, (4) plaintiff had neither the fixed asset capacity, nor the capability to expand his working assets to accommodate greater demand. In fact, in light of the IRS tax burden, it is logical to assume that any new assets would have been applied to pay off at least part of the burgeoning, and life-threatening tax debt.

Claim 5: November 1, 1973 - December 23, 1973 lost profits

This Court agrees with defendant's characterization of plaintiff's claims for loss of profits for this period as "speculative". In brief, there is no justification for plaintiff to claim lost profits when it can not demonstrate that it turned a profit in any previous period of unfettered competition. A jury "could not reasonably have inferred that (plaintiff)

would remain in operation", because it could not find, upon the evidence proffered by plaintiff that "absent the violation (plaintiff) would have been a profitable enterprise". Murphy Tugboat, supra, 658 F.2d at 1263; Webb, supra, 568 F.2d at 677.

Claims 4 and 6: Claim 4 --lost profits from sales a Bay Meadows, November 1-4, 1973; Claim 6 --ten years lost profits

The Court believes that, although currently unripe for grant of summary judgment on the issue of whether defendant's conduct was, as a matter of law, not the cause of plaintiff's cessation of business, once the tax liability alleged by defendant is substantiated by examination if the IRS documents and records, summary dismissal may be appropriate.

IT IS HEREBY ORDERED THAT THE RELEVANT IRS RECORDS PERTAINING TO PROGRAM ENGINEERING, INC.'s tax liability for employee withholding, along with whatever

other documentary evidence bearing upon the cause of plaintiff's cessation of business BE PROVIDED defendant. The vitality of plaintiff's remaining claims 4 and 6 shall be deemed submitted, without further oral argument, pending this Court's examination of the materials, and no more than ten pages (10) of additional memorandum of points and authorities.

IT IS SO ORDERED.

Dated:

SPENCER WILLIAMS
United States
District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PROGRAM ENGINEERING, INC.	)	C 77-2454 SW
Plaintiff,	)	ORDER GRANTING IN PART, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
v.	)	
CALIFORNIA JOCKEY CLUB, INC.,	)	
Defendant.	)	[Filed May 25, 1984]

ORDER

Upon this Court's consideration of the arguments and exhibits submitted by the respective parties relevant to the plaintiff's remaining damages claims 4 and 6, IT IS HEREBY ORDERED that the defendant's motion for summary judgment be

GRANTED, for reasons set out briefly below.

The only overt act by the defendant committed during the limitations period was its lease of a sliver of land from Southern Pacific on November 2,1973, after plaintiff had sold its programs earlier that day from that location, situated in the middle of the Bay Meadows' parking lot. On remand, the Ninth Circuit left little doubt that this Court was to examine the possibly anticompetitive effect of this lease upon plaintiff's efforts to sell its programs. Program Engineering, Inc. v. Triangle Publication, Inc. et al., 634 F.2d 1188, 1196 (9th Cir. 1981).

However, as is clear from Exhibit "F"[1/] to the Supplemental Declaration of Joel Linzner, the IRS levied against Program Engineering for delinquent taxes, seizing certain personal property of the concern, pursuant to an order issued November 2, 1973. The seizure was a direct result of plaintiff's activities

prior to November 2, 1973, before the aforementioned lease could have possibly had any perniciously anticompetitive effect upon the plaintiff.

Although plaintiff would have us "bootstrap" pre-limitations period activities into the IRS's decision to levy for delinquent taxes, we read Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 339 (1971), to hold only one injured by an anticompetitive act has four years from the date of that act to sue to recover all present and future damages flowing from that act even if, as of the date of the judgment, the sum of those damages is somewhat uncertain. Id. Thus, had not the plaintiff's fate at the hands of the tax collectors been sealed as of November 2, 1973, the plaintiff would be entitled to maintain its action for lost profits it claims were doomed by the defendant's act of leasing the land from Southern Pacific "out from under it". However, in light of the uncontroverted

documentation, it is clear that it was the IRS, not the defendant, who dealt the fatal blow to the plaintiff, causing it to cease operations -- or, at least the only legally relevant blow within the limitations period. IT IS SO ORDERED.

Dated:

SPENCER WILLIAMS
United States
District Judge

1/ Perhaps this exhibit is mislabelled "F", instead of "D", but we refer to a document titled "Release of Levy".

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PROGRAM ENGINEERING, INC., a corporation, Plaintiff, v. CALIFORNIA JOCKEY CLUB, a corporation, Defendant.	C 77-2454 SW ORDER SUBMITTING PLAINTIFF'S MOTIONS FOR MOTION FOR FOR RECONSIDERATION AND FOR ENTRY OF JUDGMENT WITHOUT ORAL ARGUMENT AND DENYING SAME

[Filed July 12, 1984]

ORDER

Upon this Court's careful consideration of plaintiff's motions for reconsideration or, in the alternative, to enter

judgment for nominal damages, IT IS HEREBY ORDERED THAT

1. these motions be deemed SUBMITTED WITHOUT ORAL ARGUMENT; and,

2. these motions be DENIED, with prejudice.

We have considered all of the plaintiff's arguments upon the merits, even though plaintiff's notice of motion, filed on June 6, 1984, does not provide specific grounds, responsive to our opinions and orders of January 25, or May 24, 1984, upon which we could justify reconsideration or modification of those orders. Accordingly, we decline to provide the relief plaintiff seeks. Such modification must come, if it is to come at all, from the Ninth Circuit's review, if any, of our rulings.

Thus, IT IS ORDERED THAT JUDGMENT be entered on DEFENDANT's behalf, and that PLAINTIFF take nothing by this action.

Dated:

SPENCER WILLIAMS
United States
District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PROGRAM ENGINEERING, INC., Plaintiffs, v. CALIFORNIA JOCKEY CLUB, Defendant.	No. C 77 2454 (SW) ORDER GRANTING AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [Filed Dec. 9, 1982]

The motion of Defendant for summary judgment on Plaintiffs' claim that Defendant monopolized, or attempted to monopolize, the markets of horse racing and publication of past racing information came before this court on May 12, 1982. After careful consideration of the materials submitted by both parties on these claims,

and an assiduous reading of the Ninth Circuit's opinion in this case, Program Engineering v. Triangle Publications, 634 F.2d. 1188 (9th Cir. 1980), the court hereby issues the following orders, with a brief explanation of its reasons as to each:

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment on the issue of whether it monopolized either the market for horse racing, or that of the publication of past racing information, is GRANTED. Plaintiff's failure to define a relevant market in which it and the Defendant competed, is as a matter of law, fatal to this charge. See Gough v. Rossmoor Corp., 585 F.2d 381, 185 (9th Cir. 1978).

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment on the question of whether it attempted to monopolize the market for past racing information is DENIED. The elements of an "attempt" claim are: (1) a specific intent to con-

trol prices or destroy competition in a line of commerce; (2) predatory or anti-competitive conduct directed to accomplish the unlawful purpose; and , (3) a dangerous probability of success. See, e.g., Wm. Inglis & Sons Baking Co., et al., v. ITT Continental Baking Co., Inc., 668 F.2d 1014, 1027 (9th Cir. 1981). These three elements are intertwined and, since intent and probability of success may be inferred from evidence of anticompetitive conduct, it is difficult to see how the matter can be resolved on a motion for summary judgment. To do so, the court must be satisfied, "that without weighing the credibility of witnesses, there can be but one reasonable conclusion as to the verdict." Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1300 (9th Cir. 1978). The Circuit addressed the merits of Plaintiff's claim of defendant's refusal to deal and held that sufficient facts had been alleged by the plaintiff to permit an inference that defendant's act had been motivated by

an unlawful intent or may have had an anticompetitive effect." Program Engineering v. Triangle Publications, 634 F.2d 1188, 1196 (9th Cir. 1980).

It is apparent that, in order to determine the California Jockey Club's specific intent, its actions and the likelihood of its success in causing the Plaintiff's "antitrust injury", this Court must delve into, and resolve, substantial issues of disputed facts. Resolution of this issues is clearly inappropriate on a motion for summary judgment.

IT IS SO ORDERED.

DATED: December 2, 1982.

SPENCER WILLIAMS
United States
District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PROGRAM ENGINEERING, INC., et al., Plaintiffs, v. TRIANGLE PUBLICATIONS, INC., et al., Defendants.	Civil No. C 77 2454 (SW) ORDER [Filed May 12, 1981]

Plaintiff's motion to enter judgment in conformity with the mandate of the Court of Appeals for the Ninth Circuit came on regularly for hearing on April 22, 1981 at 10:00 a.m. before The Honorable Spencer Williams, United States District Judge. Having reviewed the briefs and arguments of the parties, IT IS HEREBY

ORDERED that the judgment nunc pro tunc entered July 14, 1980 is modified consistent with the opinion of the Court of Appeals filed December 1, 1980: i.e., plaintiff Program Engineering, Inc.'s refusal to deal claim against defendant California Jockey Club under section 2 of the Sherman Act, as alleged in Count IV of the Complaint, and that claim only, is hereby reinstated to the civil docket's active list of cases.

The parties shall appear for a status conference on August 19, 1981 at 11:00 a.m..

Dated: May 12, 1981.

SPENCER WILLIAMS
United States
District Judge

APPENDIX I

STATUTES INVOLVED (AS OF OCT. 31, 1977)

15 U.S.C. 15, Section 4 of the Clayton Act, 38 Stat. 731, provided:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Sections 1 and 2 of the Sherman Act provide (Sherman Act Section 1 and 2, July 2, 1890, Chapter 647, Sections 1, 2, 26 Stat. 209, 15 U.S.C. Sections 1, 2):

"Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or

with foreign nations, is hereby declared illegal . . ."

"Section 2: Every person who shall monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a . . ."

PERSONS IDENTIFIED

Pacific Racing Association, operates Golden Gate Fields and holds its meeting February to March (ER. 49).

Tanforan Racing Association: A horse racing association which operates at Golden Gate Fields, Albany, California and Bay Meadows (ER. 49).

Triangle Publications publishes the Daily Racing Form (ER. 27).

Walter Annenberg: The owner of the stock of the company which publishes the Daily Racing Form (ER. 27).

Avelino Gil: On-track distributor of Daily Racing Form of Northern California (ER. 225).

Bernard Berman: A distributor of racing programs at Golden Gate Fields, Bay Meadows, Solano County Fair, Alameda County Fair, San Mateo County Fair (ER. 217-218; 383).

Elton Bovey: President, Magazine and Periodical Circulators Drivers Union of

Alameda and Contra Costa Counties, Teamster Local #96 (ER. 94-103).

Rodney Fraser: Assistant General Manager of California Jockey Club. In 1973 he was the Operations Manager at Bay Meadows (ER. 47, 164). Mr. Fraser was the Operations Manager for all racing associations that utilize Bay Meadows. This would make him as Operations Manager of the meeting held at Bay Meadows in 1973 (ER. 164). He assisted Mr. Ed Nevins as Operations Manager of Alameda County Fair (Id.).

Sam Geller: Triangle Publications On-Track Daily Racing Form distributor for Southern California (ER. 216).

Jack Goldberger: President, Joint Council of Teamsters No. 7 and Secretary-Treasurer of Teamsters Local #921, the Newspaper and Periodical Drivers and Helpers (ER. 53).

Robert S. Gunderson: President and General Manager of California Jockey Club (ER. 40).

Frank E. Kilroe (Jimmy Kilroe): Racing Secretary for Santa Anita Race Track and Hollywood Park (ER. 23).

Dave Powell: Business agents, Teamsters Local Union #665, Garage and Service Station Employees Union, San Francisco and San Mateo Counties (ER. 165).

Michael P. Sandler: National General Manager, Triangle Publications (ER. 464).

Anna Seller, Susan Cruess, Mrs. L. Thompson: Employed by Program Engineering to sell its programs, then employed by California Jockey Club and then released to Program Engineering (ER. 81, 82, 235-236, 281).

Mario Spampinato: On-track distributor and seller of Daily Racing Form at Northern California tracks (ER. 243).

Don Voorhees: General Manager, Golden Gate Fields 1970-June, 1972 (ER. 211).

Richard J. Murphy: General Manager, Golden Gate Fields, 1973 (ER. 213).

Kenneth Ward: Secretary-Treasurer, Teamsters Local #665 (ER. 165).

Robert S. Wuerth: Director of Publicity, California Jockey Club, Ex-Director of Publicity of Pacific Racing Association and Tanforan Racing Association, Director of Publicity of Sonoma County Fair, Solano County Fair, San Mateo County Fair, California Horse Racing Association, Quarter Horse Association at Bay Meadows, Peninsula Horse Racing Association at Bay Meadows (ER. 217, 381, 292, 165).

APPENDIX K

THOROUGHBRED RACE MEETINGS	Dates	Weeks
LOS ANGELES TURF CLUB Santa Anita Park, Arcadia	12/26/72-4/7/73	15
PACIFIC RACING ASSOCIATION (hereinafter P.R.A.) Golden Gate Fields, Albany	2/16/73-5/5/73	11
HOLLYWOOD TURF CLUB Hollywood Park, Inglewood	4/11/73-7/23/73	15
TANFORAN RACING ASSOCIATION (hereinafter T.R.A.) Golden Gate Fields, Albany	5/8/73-6/16/73	6
DEL MAR THOROUGHBRED CLUB Del Mar	7/25/73-9/12/73	7
TANFORAN RACING ASSOCIATION Bay Meadows, San Mateo	9/3/73-10/6/73	5
OAK TREE RACING ASSOCIATION Santa Anita Park, Arcadia	10/6/73-11/3/73	4
CALIFORNIA JOCKEY CLUB (hereinafter CJC) Bay Meadows, San Mateo	10/8/73-12/22/73	11

FAIR RACING MEETINGS	Dates	Days
SOLANO COUNTY, Vallejo	6/18/73-6/30/73/12	12
ALAMEDA COUNTY, Pleasanton	7/2/73-7/14/73	12
SONOMA COUNTY, Santa Rosa	7/16/73-7/28/73	12
SAN MATEO COUNTY, San Mateo	7/30/73-8/11/73	12
HUMBOLDT COUNTY, Ferndale	8/4/73-8/11/73	7
CALIF. EXPO. & FAIR, Sacramento	8/27/73-9/11/73	14

LOS ANGELES COUNTY, Ponoma 9/14/73-9/29/73 14

FRESNO DISTRICT FAIR,
Fresno 10/4/73-10/13/73 9

In addition to the race meets listed in paragraph 5 above, in 1973 the Board authorized 32 weeks of harness race meetings and 33 weeks of quarterhorse race meetings.